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APPENDIX.

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AUG 21 1968

JOHN F. DAVIS, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968

NO. 8

WILLIAM SPINELLI,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St., 63101. CEntral 1-4477.

PETITION FOR CERTIORARI FILED NOVEMBER 8, 1967

CERTIORARI GRANTED MARCH 4, 1968
MODIFIED MAY 27, 1968



IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968

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RELEVANT DOCKET ENTRIES.

District Court.

- Dec. 10, 1965 Separate motions of deft. * * * to suppress evidence * * * oral argument requested on all of said motions.
- Jan. 7, 1966 * * * Deft's motion to suppress evidence heard, argued and submitted * * *
- Jan. 21, 1966 * * * Motion of defendant to suppress evidence, overruled * * *

Court of Appeals.

- July 31, 1967 Majority and dissenting opinions filed by Court en banc.
- July 31, 1967 Judgment entered on opinion.

AFFIDAVIT FOR SEARCH WARRANT.

UNITED STATES DISTRICT COURT

for the

Eastern District of Missouri.

UNITED STATES OF AMERICA

vs.

WILLIAM SPINELLI

Commissioner's
Docket No.
Case No.

Before William R. O'Toole
Name of Commissioner

St. Louis, Missouri
Address of Commissioner

The undersigned being duly sworn deposes and says:
That he (has reason to believe) that (on the premises
known as) 1108 Indian Circle Drive, Olivette, St. Louis

County, Missouri, which is a two-story brick and masonry apartment building, in the second floor apartment in the southwest corner of the second floor of the aforesaid apartment building, also known as Apartment F, in the Eastern District of Missouri, there is now being concealed certain property, namely, bookmaking parapher-

alia, scratch sheets, bet tabs, pay and collection sheets, bookmaking records, baseball schedules, books and records of bets received, accounts, bookmaker's ledgersheets, two telephones, which are designed and intended for use,

here give alleged grounds for search and seizure and which are or have been used as the means of committing a criminal offense, namely, violation of Section 1952, Title 18, United States Code.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

The affidavit of Robert L. Bender, Special Agent of the Federal Bureau of Investigation, which is attached and which is made part of this application.

Robert L. Bender,
Signature of Affiant.
Special Agent,
Official Title, if any.
Federal Bureau of Investigation.

Sworn to before me, and subscribed in my presence,
August 18, 1965.

William R. O'Toole,
United States Commissioner.

Affidavit in Support of Search Warrant.

I, Robert L. Bender, being duly sworn, depose and say that I am a Special Agent of the Federal Bureau of Investigation, and as such am authorized to make searches and seizures.

That on August 6, 1965, at approximately 11:44 a. m., William Spinelli was observed by an Agent of the Federal Bureau of Investigation driving a 1964 Ford convertible, Missouri license HC3-649, onto the Eastern approach of the Veterans Bridge leading from East St. Louis, Illinois, to St. Louis, Missouri.

That on August 11, 1965, at approximately 11:16 a. m., William Spinelli was observed by an Agent of the Federal Bureau of Investigation driving a 1964 Ford convertible, Missouri license HC3-649, onto the Eastern approach of the Eads Bridge leading from East St. Louis, Illinois, to St. Louis, Missouri.

Further, at approximately 11:18 a. m. on August 11, 1965, I observed William Spinelli driving the aforesaid Ford convertible from the Western approach of the Eads Bridge into St. Louis, Missouri.

Further, at approximately 4:40 p. m. on August 11, 1965, I observed the aforesaid Ford convertible, bearing Missouri license HC3-649, parked in a parking lot used by residents of The Chieftain Manor Apartments, approximately one block east of 1108 Indian Circle Drive.

On August 12, 1965, at approximately 12:07 p. m., William Spinelli was observed by an Agent of the Federal Bureau of Investigation driving the aforesaid 1964 Ford convertible onto the Eastern approach of the Veterans Bridge from East St. Louis, Illinois, in the direction of St. Louis, Missouri.

Further, on August 12, 1965, at approximately 3:46 p. m., I observed William Spinelli driving the aforesaid

1964 Ford convertible onto the parking lot used by the residents of The Chieftain Manor Apartments approximately one block east of 1108 Indian Circle Drive.

Further, on August 12, 1965, at approximately 3:49 p. m., William Spinelli was observed by an Agent of the Federal Bureau of Investigation entering the front entrance of the two-story apartment building located at 1108 Indian Circle Drive, this building being one of The Chieftain Manor Apartments.

On August 13, 1965, at approximately 11:08 a. m., William Spinelli was observed by an Agent of the Federal Bureau of Investigation driving the aforesaid Ford convertible onto the Eastern approach of the Eads Bridge from East St. Louis, Illinois, heading towards St. Louis, Missouri.

Further, on August 13, 1965, at approximately 11:11 a. m., I observed William Spinelli driving the aforesaid Ford convertible from the Western approach of the Eads Bridge into St. Louis, Missouri.

Further, on August 13, 1965, at approximately 3:45 p. m., I observed William Spinelli driving the aforesaid 1964 Ford convertible onto the parking area used by residents of The Chieftain Manor Apartments, said parking area being approximately one block from 1108 Indian Circle Drive.

Further, on August 13, 1965, at approximately 3:55 p. m., William Spinelli was observed by an Agent of the Federal Bureau of Investigation entering the corner apartment located on the second floor in the southwest corner, known as Apartment F, of the two-story apartment building known and numbered as 1108 Indian Circle Drive.

On August 16, 1965, at approximately 3:22 p. m., I observed William Spinelli driving the aforesaid Ford convertible onto the parking lot used by the residents of

The Chieftain Manor Apartments approximately one block east of 1108 Indian Circle Drive.

Further, an Agent of the F. B. I. observed William Spinelli alight from the aforesaid Ford convertible and walk toward the apartment building located at 1108 Indian Circle Drive.

The records of the Southwestern Bell Telephone Company reflect that there are two telephones located in the southwest corner apartment on the second floor of the apartment building located at 1108 Indian Circle Drive under the name of Grace P. Hagen. The numbers listed in the Southwestern Bell Telephone Company records for the aforesaid telephones are WYdown 4-0029 and WYdown 4-0136.

William Spinelli is known to this affiant and to federal law enforcement agents and local law enforcement agents as a bookmaker, an associate of bookmakers, a gambler, and an associate of gamblers.

The Federal Bureau of Investigation has been informed by a confidential reliable informant that William Spinelli is operating a handbook and accepting wagers and disseminating wagering information by means of the telephones which have been assigned the numbers WYdown 4-0029 and WYdown 4-0136.

Robert L. Bender, Special Agent,
Federal Bureau of Investigation.

Subscribed and sworn to before me this 18th day of August, 1965, at St. Louis, Missouri.

William R. O'Toole.

SEARCH WARRANT.

UNITED STATES DISTRICT COURT

for the

Eastern District of Missouri.

UNITED STATES OF AMERICA

vs.

WILLIAM SPINELLI

Commissioner's

Docket No.

Case No.

To: Patrick W. Bradley, Special Agent of the Federal Bureau of Investigation, or to any duly authorized agent of the Federal Bureau of Investigation, or to any Civil Officer of the United States authorized to enforce any law thereof.

Affidavit having been made before me by Robert L. Bender, Special Agent, Federal Bureau of Investigation, that he has reason to believe that on the premises known as the southwest corner-apartment on the second floor of a two-story apartment building of brick and masonry, said apartment building known and numbered as 1108 Indian Circle Drive, Olivette, St. Louis County, Missouri; and the said second floor apartment in the southwest corner of said building is also known as Apartment F in the Eastern District of Missouri, there is now being concealed certain property, namely bookmaking paraphernalia, scratch sheets, bet tabs, pay and collection sheets, bookmaking records, baseball schedules, books and records of bets received, accounts, bookmaker's ledger sheets, two telephones which are designed and intended for use, and which are or have been used, as the means of committing a criminal offense, namely, violation of Section 1952, Title 18, United States Code, and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the premises

above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the place named for the property specified, serving this warrant and making the search in the daytime and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 18th day of August, 1965.

William R. O'Toole,
U. S. Commissioner.

Return.

I received the attached search warrant on August 18th, 1965, and have executed it as follows:

On August 18th, 1965 at 7:07 o'clock P. M., CDT., I searched the premises described in the warrant and I left a copy of the warrant together with a receipt for the items seized at the premises searched from which the property was taken.

The following is an inventory of property taken pursuant to the warrant:

See attached list.

This inventory was made in the presence of Clark S. Smith and James A. Talley, Special Agents of F. B. I. and

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

Patrick W. Bradley.

Subscribed and sworn to and returned before me this 23 day of August, 1965.

William R. O'Toole,
U. S. Commissioner.

Items Seized During Search of Apartment F at 1108 Indian Circle Drive, St. Louis County, Missouri, August 18, 1965, by Special Agents Clark S. Smith, James A. Talley, and Patrick W. Bradley.

1. One brown paper bag containing torn bet tabs, sports line, etc. (appropriately sealed and marked No. 1 for evidence), seized from the floor adjacent to the northwest corner of the dinette table located in the northernmost bedroom of Apartment F.
2. One Underwood Adding Machine, Model No. 782A, Serial Number 290438, in tan leather case (appropriately marked No. 2), seized from the top of the dinette table located in the northernmost bedroom of Apartment F.
3. One pencil sharpener, Boston Champion (appropriately marked No. 3), seized from the top of the dinette table located in the northernmost bedroom of Apartment F.
4. Fifty-eight "Pay As You Go" checking account deposit tickets, blank, for the State Bank and Trust Company of Wellston, St. Louis 33, Missouri, No. 0810-0111 (appropriately marked No. 4), seized from the top of the dinette table located in the northernmost bedroom of Apartment F.
5. One General Electric AM-FM fifteen-transistor radio, bearing the number 3418 stamped inside the back cover (appropriately marked No. 5), seized from the top of the dinette table located in the northernmost bedroom of Apartment F.
6. Nine pamphlets called "Baseball Scoreboard", showing the complete monthly schedule of baseball games from August 9 through September 5, 1965, listed as Volume VI (appropriately marked No. 6), seized from the top of the dinette table located in the northernmost bedroom of Apartment F.

7. One baseball calculator apparently published by Ar-
cadia Sales and Publishing Company, 242 North Clark
Street, Chicago, Illinois (appropriately marked No. 7),
seized from the top of the dinette table located in the
northernmost bedroom of Apartment F.
8. Six Bookmaking ledger sheets (pay-and-collect sheets),
held together by a paper clip, silver in color (appropri-
ately marked No. 8), seized from the top of the dinette
table located in the northernmost bedroom of Apart-
ment F.
9. One envelope, white in color, containing fourteen bet
tabs and \$22 in United States currency, represented by a
\$10 bill, Series 1950C, Serial Number J01307624B; two \$5
bills, both Series 1950C, Serial Numbers A28084980B and
G28925423D; and two \$1 bills, both Series 1963, Serial
Numbers H68411677A and H56927859A (appropriately
marked No. 9), seized from the top of the dinette table lo-
cated in the northernmost bedroom of Apartment F.
10. One ledger sheet (graph paper) bearing the sports
line for baseball games of August 18, 1965 (appropriately
marked No. 10), seized from the top of the dinette table
located in the northernmost bedroom of Apartment F.
11. One pair of eyeglasses in brown semi-transparent
frames (appropriately marked No. 11), seized from the top
of the dinette table located in the northernmost bedroom
of Apartment F.
12. One Timex wrist watch, case silver in color, with
black leather-appearing strap and white face with gold-
colored numbers (appropriately marked No. 12), seized
from the top of the dinette table located in the northern-
most bedroom of Apartment F.
13. One pad of graph paper, white in color with blue
ruling (appropriately marked No. 13), seized from the top

of the dinette table located in the northernmost bedroom of Apartment F.

14. Four ballpoint pens and two lead pencils (appropriately marked No. 14), seized from the top of the dinette table located in the northernmost bedroom of Apartment F.

15. One pad of graph paper, white in color with blue ruling (appropriately marked No. 15), seized from the top of the dinette table located in the northernmost bedroom of Apartment F.

16. One copy of apartment lease dated December 8, 1964, between Chieftain Manor Apartments, Inc., and GRACE P. HAGEN, for a term of one year, commencing the first day of January, 1965, through the last day of December, 1965, for Apartment F on the second floor of the building known and numbered as 1108 Indian Circle Drive, St. Louis 32, Chieftain Manor Apartments (appropriately marked No. 16), seized from the top of the refrigerator in the kitchen of Apartment F.

17. One brown pasteboard box marked "DASH", containing two telephones, one pink in color and one beige in color, both bearing the identification number WY 4-1983 (appropriately marked No. 17), seized from a hallway between the living room and bedroom area in Apartment F.

18. Two telephones, one white in color and bearing the number WY 4-0136 and one blue in color and bearing the number WY 4-0029 (appropriately marked No. 18), seized from the top of the dinette table located in the northernmost bedroom of Apartment F, after being disconnected by ROBERT G. POWERS, Southwestern Bell Telephone Company No. M17414.

19. One telephone, black in color, bearing no number (appropriately marked No. 19), seized from the shelf in the closet located adjacent to the entrance door in the living room of Apartment F.

20. Bet tab with the names of three horse entries imprinted thereon (appropriately marked No. 20), seized from the linen closet in the hallway between the living room area and the northernmost bedroom in Apartment F.

**TRANSCRIPT OF TESTIMONY / T
PRE-TRIAL HEARING.**

(Portions of Record, Vol I.)

ROBERT L. BENDER,

Direct Examination, by Mr. Baris.

* * * * *

[47] Q. Did you have any information at the time of making this affidavit and applying for the warrant that Mr. Spinelli was conducting any illegal operations at that address?

A. Yes, I had received reliable information that he was conducting gambling activities from that address.

Q. What was the nature of the information that you had received?

A. The information was that he was carrying on bookmaking activity and possibly disseminating a line.

Q. From whom did you receive that information?

A. One of the other agents.

Q. Who was that?

A. Special Agent Bradley.

Q. Do you know the source of Agent Bradley's information?

[48] A. No, I do not.

Q. Was any of your information based upon any wire tapping activities by you or any other agent?

A. Very definitely not.

Q. When did you receive the information from Agent Bradley concerning Mr. Spinelli's operation of a gambling operation?

A. I can't be actually specific on that date, Mr. Baris, but I would guess that it would be approximately the 7th or 8th of August. I might add to that that there were other occasions than that particular occasion, if that were the date, that I had received information from Mr. Bradley that Mr. Spinelli was carrying on gambling activities.

* * * * *

[49] Q. Where was Mr. Spinelli arrested?

A. Mr. Spinelli was arrested immediately outside the [50] door of Apartment F, second floor, at 1108 Indian Circle Drive, on August 18th, at approximately 7:05 p. m.

Q. Do you know whether or not the search had taken place of the premises at the time you placed Mr. Spinelli under arrest?

A. No, sir, the search was made in conjunction with, you might say, or immediately after Mr. Spinelli was arrested by myself and Agent Frank Walls. At the time of Mr. Spinelli's arrest, I identified myself to him as special agent of the FBI, and also identified the agents that were with me. Mr. Spinelli was immediately advised of the nature of the charges against him, the fact that we did have an arrest warrant for him, and we also had a search warrant for the premises of Apartment F. He was advised by me that he did not have to make any statement, that any statement he might make could be used against him in a court of law, that he was entitled to consult an attorney prior to any statement, and that if he could not afford an attorney the court would probably provide one for him.

* * * * *

Q. Now, was the apartment open or closed at the time [51] you placed him under arrest?

A. The apartment door was closed.

Q. Did you see him coming out of the apartment at the time you made the arrest?

A. Yes, we did.

Q. Where were you at the time you saw him coming out of the apartment?

A. We were immediately across the hall in Apartment H.

Q. Whose apartment was that?

A. The man's name I can't recall, but it was one of the tenants in the apartment building at the time.

Q. How long had you been in Apartment H?

A. Since approximately 4:55 p. m. that afternoon.

* * * * *

[53] Q. Mr. Bender, I believe you stated this morning you were in the apartment from 4:55 until about 7:05, when you placed the defendant under arrest, is that correct?

A. We were in the apartment across the hall from Apartment F, which was the apartment that Mr. Spinelli came out of.

Q. I see. Apartment H was the one that you were in, is that correct?

A. Yes, that's correct.

Q. And you and Agent Walls and Agent Bradley were the three in that apartment?

A. That's right.

Q. Did you see Mr. Spinelli when he arrived in the apartment building?

A. No, we did not.

Q. Is it your impression that he was there when you [54] arrived or that he came there after 4:55?

A. Well, at the time that we arrived, Mr. Spinelli's automobile was parked in the parking space which is part of the apartment complex at Indian Circle Drive, and at that time, at approximately 4:55, we observed the car in the

parking lot, at which time we proceeded on into this Apartment H that's been referred to.

Q. Did you have any prearrangement with the occupant of Apartment H that you could come in there?

A. Yes; we had made arrangements to utilize that apartment for the purpose for which we used it for.

Q. When were those arrangements made?

A. I believe that we contacted that gentleman the day before, which would have been the 17th. Might have been on the 16th. I believe the 17th of August.

Q. Now, may I ask the reason for going to the apartment rather than—to Apartment H rather than going to Apartment F?

A. Well, we wanted to observe Mr. Spinelli come out of Apartment F, the apartment in question, and consequently this was the only spot that we could utilize under the circumstances, and we did utilize the apartment, and we did see Mr. Spinelli come out of Apartment F.

Q. During all this time Agent Bradley had the search [55] warrant with him, is that correct?

A. Yes, sir.

Q. And he made no effort to execute the search warrant at 4:55?

A. Not at 4:55, no. At the time that Mr. Spinelli was placed under arrest, at that time the search warrant was displayed to Mr. Spinelli.

Q. But there was no effort made to enter the premises before his arrest by Agent Bradley or anyone else, either forcibly or by invitation?

A. That's right.

[69]

PATRICK W. BRADLEY.

Cross-Examination, by Mr. Koster.

Q. Mr. Bradley, when did you receive this information concerning gambling at these telephone numbers?

A. In early August. I don't have the exact date with me. It was in the first few days of August.

Q. Did your informant tell you the numbers, the telephone numbers where this activity was being carried on?

A. Yes.

Q. Had you ever received any information from this person before?

A. Yes.

Q. On how many occasions approximately?

A. Approximately once a week since 1963.

Q. Had you checked out the information you had received before from this individual?

A. Yes.

Q. Did it prove to be reliable?

A. Yes.

Q. You consider him a reliable informant?

A. Yes.

Q. Now, after you received the telephone numbers from the informant, did you or anyone check the telephone company records?

A. I furnished them to Mr. Bender and he checked the [70] records.

* * * * *

[72]

Redirect Examination, by Mr. Baris.

Q. Agent Bradley, you say this informant had been giving you information for a period of two years, is that correct?

A. Yes.

Q. Do you know whether any convictions resulted from any of the information which he had given to you?

Mr. Koster: Your Honor, I think I'll object to that question because I don't think it's relevant and material to determine the reliability of the informant.

The Court: I'll let him answer.

A. I honestly don't know the answer to that. I'd have to go back and check the record.

Q. (By Mr. Baris) Can you tell us what you were told by this informant?

A. That there was a gambling operation being operated by Mr. Spinelli at WYdown 4-0136, and WYdown 4-0029.

Q. And that's all he said, there's a gambling operation being operated?

A. I don't recall the exact words, but that's what it ended up to be.

Q. Was anyone else present when you received this information from the informant?

A. No.

• • • • •

In the

UNITED STATES DISTRICT COURT,

Eastern District of Missouri,
Eastern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM SPINELLI,

Defendant.

} No. 65Cr 226 (1).

ORDER.

• • • • •

Defendant also has a motion before the court to suppress evidence. In order to challenge the validity of a search, the movant must meet a certain minimum requirement of interest in the property seized. This interest

must be such that the movant shows that he was at least legitimately upon the premises searched. The requirement for legitimate presence is the absolute minimum and was set out in *Jones v. United States*, 362 U. S. 257, 267. The defendant has failed to allege or show that such was the circumstance, and the defendant, therefore, lacks standing to protest the search. Accordingly, defendant's motion to suppress evidence is overruled.

/s/ Roy W. Harper,
U. S. District Judge.

January 20, 1966.

JUDGMENT.

United States Court of Appeals.
For the Eighth Circuit.

No. 18,389.

September Term, 1966.

William Spinelli,

Appellant,

vs.

United States of America.

Appeal from the
United States Dis-
trict Court for the
Eastern District of
Missouri.

This cause came on to be heard by this Court, sitting en banc, on the original files of the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby affirmed, in accordance with the majority opinion of this Court this day filed herein.

And it is further Ordered by this Court that the defendant in the said District Court, William Spinelli, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after date of filing of the mandate in the District Court.

July 31, 1967.

Order entered in accordance with majority opinion:

✓ /s/ Robert G. Tucker,
Clerk, U. S. Court of Appeals
For the Eighth Circuit.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 18,389

William Spinelli,

v.

United States of America,

Appellant,
Appellee.

Appeal from the
United States Dis-
trict Court, East-
ern District of
Missouri.

[July 31, 1967.]

Before VOGEL, Chief Judge, and VAN OOSTERHOUT, MATTHES,
BLACKMUN, MÉHAFFY, GIBSON, LAY, and HEANEY, Cir-
cuit Judges, sitting en banc.

GIBSON, Circuit Judge.

This is an appeal from a judgment of the United States District Court for the Eastern District of Missouri convicting appellant of violating 18 U.S.C. § 1952 (Interstate travel in aid of racketeering).

Appellant was tried before a jury on an indictment which charged that he had traveled in interstate commerce with intent to promote, manage, establish, carry on, and facilitate the promotion of an unlawful activity, to-wit: a business enterprise involving gambling in violation of the law of Missouri, § 563.360, R. S. Mo., 1959; and did thereafter perform and attempt to perform acts to promote, manage, establish and carry on, and facilitate the promotion, management, establishment and carrying on

of said unlawful activity. He was found guilty by the jury and sentenced by the Court to three years imprisonment and a \$5,000.00 fine.

The appeal from that judgment was initially argued before a division of this Court consisting of Judges Van Oosterhout, Gibson, and Heaney. Contrary to the holding of the District Court, the panel agreed that appellant had standing to object to a search of an apartment room that he was not actually occupying, and the majority of that panel, in an opinion authored by Judge Heaney, ruled that the conviction of appellant should be reversed as evidence seized in that room was the result of an unconstitutional search. The majority felt that the affidavit in support of the search warrant did not establish probable cause. On this point Judge Gibson dissented. The numerous other points of error alleged by appellant were not considered by the panel because of the dispositive nature of the majority holding on the search warrant issue.

Thereafter, the government petitioned the Court for a rehearing en banc. Owing to the importance of the question and the division of opinion on the panel, a rehearing en banc was ordered. At this point appellant contends that a rehearing violates his constitutional protection against double jeopardy. As the government cannot generally appeal actions by the trial court, appellant contends the government cannot "appeal" decisions reached by a division of the Court. Appellant cites no authority for this position and we are not persuaded by his argument.

It is true that the government has no right to appeal in criminal cases unless specifically authorized by statute. *Umbriaco v. United States*, 258 F.2d 625 (9 Cir. 1958); 24 C.J.S. Criminal Law § 1659. However, this prohibition arises out of the common law and is not necessarily encompassed by the constitutional prohibition. For, as we see, 18 U.S.C. § 3731 specifically authorizes govern-

ment appeals in some instances, and the exercise of this right of appeal does not necessarily violate a criminal defendant's right against double jeopardy. *United States v. Bitty*, 208 U.S. 393 (1908). See, *United States v. Ventresca*, 380 U.S. 102 (1965) in which the government secured review of an adverse Court of Appeals decision.

However, we need not pursue the matter of constitutionality of government appeals in that an appellate court's reconsideration of its own position on a question of law, is far different from an appeal from a final decision of a trial court. As long as this Court has jurisdiction over the cause, it has the express authority under Title 28, U.S.C. § 46 and § 2106 and Court Rule 15 to rehear and, if necessary, modify its decisions. *Uline v. Uline*, 205 F.2d 870 (D.C.Cir. 1953); 14A *Cyclopedia of Federal Procedure*, § 68.123 (3rd Ed., 1965 Rev. Vol.); 36 C.J.S. *Federal Courts*, § 301(31).

This Court retains jurisdiction over a cause at least until a mandate is issued in accordance with a majority opinion. Since no mandate has issued in this case, the opinion of the panel was interlocutory and the Court retains the jurisdiction necessary to question and change any tentative decisions of the Court without subjecting appellant to any form of additional jeopardy.

Obviously, an appellate court's reconsideration of its legal opinion is completely unlike requiring a criminal defendant to stand trial a second time on a factual issue after once being acquitted. See, *Palko v. Connecticut*, 302 U.S. 319 (1937). Consequently, it has been held by the Supreme Court that even though an appellant's conviction has been ordered reversed by a Court of Appeals, the Court of Appeals still retains the power to amend or revise that reversal order upon the rehearing of the action, and its reconsideration does not subject the criminal defendant to double jeopardy. *Forman v. United*

States, 361 U.S. 416, 425-426 (1960). This Court has jurisdiction to rehear the case and alter its judgment thereon without infringing upon appellant's constitutional rights. 12 Cyclopedia of Federal Procedure, § 51.178 (3rd Ed., 1965 Rev. Vol.)

A large number of questions on this appeal revolve around the search warrant used to uncover the incriminating evidence of gambling. Among these questions are: appellant's standing to question its validity, the sufficiency of the information before the issuing magistrate, the propriety of its execution, the failure to specify some of the evidence that was seized.

After lengthy surveillance of appellant the F.B.I. sought an arrest warrant and a search warrant. The affidavit in support of the search warrant was made before a United States Commissioner in St. Louis, Missouri, on August 18, 1965 and was signed by a Special Agent of the F.B.I. It related that the affiant or other agents of the F.B.I. observed appellant driving his automobile onto the eastern approaches of bridges leading from East St. Louis, Illinois to St. Louis, Missouri on four occasions in 1965; August 6, 11:44 a.m.; August 11, 11:16 a.m.; August 12, 12:07 p.m.; August 13, 11:08 a.m. He was observed driving off of the western end of Eads Bridge in St. Louis, Missouri on two of these occasions: August 11 and August 13.

The affiant further related that appellant had been observed by federal agents driving the car into a parking area used by residents of the Chieftain Manor Apartments at 1108 Indian Circle Drive in St. Louis, Missouri, on August 11, 4:40 p.m.; August 12, 3:46 p.m.; August 14, 3:45 p.m.; and August 16, 3:22 p.m. On August 12 appellant was observed entering the front entrance of the Chieftain Manor Apartments. On August 13 appellant was observed entering the southwest corner apartment

on the second floor designated as Apartment F. On August 16, after parking his car in the lot appellant was observed walking toward the apartment building.

After this detail recitation of appellant's movements the affidavit went on to state:

"The records of the Southwestern Bell Telephone Company reflect that there are two telephones * * * (in apartment F) under the name of Grace P. Hagen * * *. The numbers * * * are WYdown 4-0029 and WYdown 4-0136."

"William Spinelli is known to this affiant and to federal law enforcement agents and local law enforcement agents as a bookmaker, an associate of bookmakers, a gambler, and an associate of gamblers."

"The Federal Bureau of Investigation has been informed by a confidential reliable informant that William Spinelli is operating a handbook and accepting wagers and disseminating wagering information by means of the telephones which have been assigned the numbers of WYdown 4-0029 and WYdown 4-0136."

On the basis of this information the Commissioner issued a warrant for the search of Apartment F of the Chieftain Manor Apartments. No oral testimony was taken.

Armed with the warrant the federal agents went directly to the apartment building and stationed themselves in an apartment across the hall from Apartment F. After a two hour and ten minute wait, the appellant emerged from Apartment F into the hall and was served with an arrest warrant. At the same time he was served with the warrant to search the apartment. A key found on his person was used to open the apartment door. A number of agents searched the premises, while others took appellant to police headquarters. The search uncovered various items of gambling paraphernalia which were

introduced against appellant and were considered as items essential to appellant's conviction.

A motion to suppress the evidence obtained in the search was timely made and overruled by the District Court on the ground that the appellant had failed to allege or show that he was legitimately upon the premises searched, and, therefore lacked standing to object.

STANDING TO OBJECT

We feel the trial court did not apply the existing law and that defendant does have standing to object to the search of this apartment. In *Jones v. United States*, 362 U.S. 257 (1960) the defendant was charged with violating federal narcotics statutes which permit conviction upon proof of possession of the narcotics. The Supreme Court, overruling the trial court and the Court of Appeals, held that defendant, a guest in an apartment at the time it was searched, had standing under Rule 41(e) of the Fed. Rules of Criminal Procedure to question the validity of a search in which narcotics were seized.

To have standing to object to a search under Rule 41(e) the defendant must be the "person aggrieved" by the search. The Fourth Amendment to the Constitution is aimed at the protection of the privacy of citizens. *Boyd v. United States*, 116 U.S. 616, 630 (1886). Therefore, to be aggrieved by a search in violation of this Amendment a person must be able to show that his privacy was invaded by the search. Prior to *Jones*, most of the courts applied strict doctrines of common law property rights and required for standing a showing of some very significant possessory interest in the premises. *Jones*, however, supplanted this line of authority and held that if the defendant could show that he was legally upon the premises and the fruits of the search were proposed to be used against him, his privacy had been invaded to the degree necessary to give him standing to object to the search.

In *United States v. Miguel*, 340 F.2d 812, 814 (n.2) (2 Cir. 1965) cert. denied 382 U.S. 859, the court held that a lobby of a multi-tenant apartment was not within the protection of appellant's dwelling, but significantly stated:

"Miguel did not own the apartment on the sixteenth floor. The tenant was Miss Almerio Lewis, who allowed appellant to stay there from time to time and keep his clothes there. This gave him standing under Rule 41(e) Fed. Rules of Cr. Proc. to object to a search of the apartment of Miss Lewis."

In *Foster v. United States*, 281 F.2d 310 (8 Cir. 1960) we held a person using the back room of a tavern with the consent of the manager, who was his wife, might have standing to object to the search of that room even though he was absent and his wife consented to the search.

We believe *Jones*, *Miguel*, and *Foster*, clearly indicate that it is the right to use the premises that is a factor determinative of standing. If the defendant is legally occupying, or has been granted a right to occupy the premises; even though he is not physically present at the time of the search, then his privacy has been invaded by a search of these premises. As a person so aggrieved by the search he has a right to object, and to do so he need not allege his specific proprietary interest, i. e., owner, lessee, business invitee, etc. Nor is he required to take the stand to establish his particular interest.

In the case before us, appellant's right to be on the premises is established by inference from the allegations in the indictment, the statements in the affidavit in support of the search warrant, and the testimony developed at the hearing to suppress. Appellant had been seen using the tenant's parking lot. He was seen entering the apartment alone on August 13, and was seen entering or approaching the apartment building on at least two other occasions. On the day the search warrant was executed appellant was alone in the apartment for at least two hours. When he

was arrested immediately upon emerging from the door of Apartment F, he had a key to this apartment on his person.

The government's argument that appellant is not entitled to standing because he was arrested and served with the search warrant in the hall immediately outside the apartment is without merit. As we stated, the determinative factor in assessing appellant's constitutional right to privacy, and consequently his standing to object to a search, is his legal right to use these premises. The fact that appellant was in the act of voluntarily leaving the apartment when served does not weaken his right to be on these premises. Appellant's basic constitutional right of privacy cannot be circumvented by the expedient of withholding service of a warrant until the moment the accused is in the act of leaving the premises to be searched.

Consequently, we believe the evidence before the trial judge established that appellant had sufficient interest in the premises to be a "person aggrieved" by the search, and thus has standing to raise the question of the sufficiency of the showing of probable cause supporting the warrant.

PROBABLE CAUSE

The United States Commissioner in issuing the search warrant believed from the information in the affidavit that there was probable cause to believe the law was being violated on the described premises.

Our duty on this appeal is not to make our independent determination of probable cause. Our duty is solely limited to the determination of whether the information before the Commissioner was legally capable of persuading him, as a man of reasonable caution, that the laws of the United States were being violated with part of this violation consisting of an illegal act being committed on the

described premises. *Wong Sun v. United States*, 371 U.S. 471, 479 (1963); *Brinegar v. United States*, 338 U.S. 160 (1949).

If the information in the affidavit, in its totality, provided the Commissioner with a substantial basis to conclude that a gambling business was being conducted on the premises and the appellant was engaged in interstate travel in connection therewith, nothing more is required of us. The finding of the Commissioner must be sustained. *Rugendorf v. United States*, 376 U.S. 528, 533 (1964); *Jones v. United States*, 362 U.S. 257 (1960).

Upon viewing all of the information in the affidavit we do not believe we can say, as a matter of law, that the conclusion reached by the Commissioner is without substantial basis and could not possibly be drawn by a "neutral and detached magistrate". Thus the warrant must be upheld.

The affidavit, to establish an essential element of the federal crime, sets forth repeated observations of interstate travel. Four additional evidentiary facts tend to support the finding of the Commissioner that there is probable cause to believe illegal gambling activities were taking place on the described premises.

1. The affidavit set forth in detail appellant's repeated visits at approximately the same time in the afternoon to an apartment that was not his home.
2. The affidavit set forth information received from the telephone company that this apartment visited by appellant had two telephones with different numbers.
3. The affiant recited of his personal knowledge that appellant was a gambler, a bookmaker, and an associate of gamblers and bookmakers.
4. The affiant stated that the F.B.I. had been informed by a reliable informant that Spinelli was "operating a

hand book and accepting wagers and disseminating wagering information by means of the telephones”

We agree that if these individual pieces of information were viewed in isolation, each would probably not independently support a constitutional warrant. However, they should not be so viewed. When viewed in their totality, they together form a relatively composite picture of appellant visiting the described apartment for the purpose of conducting gambling activities. See the warrant approved in *United States v. Whiting*, 311 F.2d 191 (4 Cir. 1962), cert. denied 372 U.S. 935, and the arrest in *Hernandez v. United States*, 353 F.2d 624, 627-628 (9 Cir. 1965), cert. denied 384 U.S. 1008.

As a series of seemingly innocuous bits of evidence can combine to form a web of circumstantial evidence sufficient to justify jury conviction, in the same manner independent facts can combine to form a sufficiently clear picture of a probable violation of the law to justify a magistrate in issuing a constitutional warrant. *United States v. Pinkerman*, 374 F.2d 988, 991 (4 Cir. 1967). See also, *Christensen v. United States*, 259 F.2d 192, 193 (D.C.Cir. 1958); *Hernandez v. United States*, supra, at page 628.

The repeated afternoon visits to an apartment away from one's home, could well have many legal purposes. However, it is a slightly suspicious fact warranting some note, and it takes on added significance when coupled with other known factors. Pointing out that the frequently visited apartment has two telephones adds a bit more to the suspicion. Though one may have numerous legal uses for two independent telephone lines in a private apartment they are somewhat unusual, and are suspicious to the degree that multiple telephones are a common characteristic of a gambling operation. When a person who frequently visits the apartment with the two tele-

phones is known to be a gambler, a bookmaker and an associate of gamblers and bookmakers, vague suspicions begin to take form that gambling may be taking place in this apartment.

Finally, when the hearsay information is provided, coming from one sworn to be reliable, that the known gambler who visits the apartment with two phones is actually conducting gambling activities over these phones, setting forth the exact telephone numbers, we believe these established suspicions could validly ripen into a reasonable belief that a gambling business is being conducted on the premises. A magistrate who issues a warrant on the basis of this information is certainly not abusing the warrant process. Nor could it be said, as a matter of law, that he could not have made an independent determination of the issue. An independent determination of a magistrate has indeed been interposed between the citizen and the police. *McDonald v. United States*, 335 U.S. 451 (1948).

Of course, it could be argued that this evidence is a long way from certainty. We are, however, dealing not with certainty, but with probable cause, and:

"In dealing with probable cause . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved." *Brinegar v. United States*, 338 U.S. 160, 175 (1949)..

Probable cause is more than suspicion but it is far less than the evidence sufficient to justify the conviction. *Locke v. United States*, 7 Cranch 339 (1819). In fact, the evidence in support of a warrant may consist entirely of hearsay or otherwise incompetent evidence. *Aguilar v. Texas*, 378 U.S. 108 (1964); *Hodgdon v. United States*,

365 F.2d 679, 684 (8 Cir. 1966); *Jackson v. United States*, 302 F.2d 194, 197 (D.C.Cir. 1962).

Indeed, even less evidence is needed for the probable cause justifying the issuance of a warrant than the probable cause necessary for an officer to act without a warrant. *Aguilar v. Texas*, *supra*; *Johnson v. United States*, 333 U.S. 10 (1948). The exigencies of law enforcement demand that an applying officer need not prove in a full-blown plenary hearing, that the suspect has, beyond a reasonable doubt, committed a violation of the law. He need only demonstrate a probability. We are dealing herein with a threshold of proof using layman's terms that is more than suspicion but is obviously far less than certainty.

Relying primarily upon *Aguilar v. Texas*, *supra*, appellant argues that the hearsay statement from the informer, as the core of this affidavit, cannot support the finding of probable cause. We think not. It is well established that informer statements may serve as the basis for probable cause if the statements are "reasonably corroborated by other matters" brought to the attention of the magistrate. *Jones v. United States*, 362 U.S. 257 (1960); *Rosenkrantz v. United States*, 356 F.2d 310, 314 (1 Cir. 1967); *Hodgdon v. United States*, 365 F.2d 679 (8 Cir. 1966).

In the recent case of *McCray v. Illinois*, ... U.S. ... (March 20, 1967), an informant told police officers that McCray would be on a given street corner at a particular time and that he would be in the possession of narcotics. At the appointed time McCray appeared at the designated corner and was pointed out to the officers by the informant. The officers arrested McCray without a warrant and discovered the narcotics. The majority of the Supreme Court held that the fact McCray was where the informant said he would be was sufficient circumstance underlying the informant's information to give the offi-

cers the probable cause necessary to make a constitutional arrest.

Very similarly in *Draper v. United States*, 358 U.S. 307 (1959), the police were given a description of a man they were told would be carrying narcotics. When the officers went to the appointed place at the appointed time they recognized petitioner by the description given them by the informant. With nothing more they arrested appellant without a warrant and subjected him to a search. The Supreme Court determined that the officers had the necessary probable cause when the informer's reliability was verified by what they actually observed of the appellant's presence and personal appearance.

The Court has consistently demanded a higher showing of probable cause when the officer is acting without a warrant than it would if the issuance of the warrant followed the detached consideration of an independent judicial officer. Yet we note that both of these Supreme Court cases involved arrests made without warrants, followed by searches uncovering incriminating evidence. And in each the only substantiation of the informer's information was that the appellants were at a time and place specified by the informer (plus in *Draper* the accused corresponded to a description given by the informer). The personal observation by the officers in these cases, of course, established to a degree the basic reliability of the informer, but added no corroboration or underlying justification to the factual statement that the accused possessed narcotics. But regardless of the substantially higher standard of probable cause demanded of actions without warrants, these arrests were sanctioned by the Court. Certainly, the corroboration of the informers' statement in these two cases is far less than the detail corroborative facts before us, which substantiate both the informer's basic reliability and the accuracy of the factual statement that

Spinelli was conducting gambling operations on the premises.

In the case before us, the informant, who was sworn to be reliable, stated that Spinelli was "operating a handbook and accepting wagers and disseminating wagering information by means of the telephones [numbered] WYdown 4-0029 and WYdown 4-0136."

This information cannot be simply classified as a conclusion. It is a statement that entails no imprimatur of a legal concept to bring into being, nor does it require the analysis of an expert. It is a simple statement of fact, using direct and simple words that cannot be reduced to a lower level of inference. Of course, it would have been preferable if the informer had buttressed his statement with additional information as to how he acquired knowledge of these facts. But this shortcoming does not mean that his statement is anything other than a simple factual summary.

Furthermore, the underlying accuracy of this hearsay statement is corroborated by the information from the telephone company that the telephone numbers recited by the informer are the numbers actually in existence and installed in the apartment. As in *McCray* and *Draper* the reliability of the informer's information is even further substantiated by the personal observations of the agents. They observed Spinelli entering the very apartment where the phones specified by the informant were located, and consequently where the illegal activity was, according to the informer's information, supposedly taking place. Finally, the allegedly conclusionary information that Spinelli was gambling on these premises is substantiated, to a degree, by the fact of Spinelli's repeated visits, the presence of the two telephones, and the personal knowledge of affiant that Spinelli was a gambler and an associate of gamblers. We believe these facts presented to the Com-

missioner are far stronger than those in *McCray* and *Draper* and that they combine to solidly confirm, support, verify and substantiate the accuracy and reliability of the informer's statement.

The conclusion to be drawn from an analysis of these cases is clear. Applying a higher standard of probable cause than must be applied in the case before us, the Supreme Court has upheld in *McCray* and *Draper* official police action supported by far less factual justification. Consequently, unless that Court requires a higher degree of substantiation to a lower standard of probable cause, we must assume they would declare the warrant to be constitutional. In light of the holdings in *McCray* and *Draper*, if we were to strike down the warrant in the case before us we would be requiring a more exacting standard of probable cause when the officers present their information to a magistrate and act on the authority of a warrant issued by him than we would if the officers acted on this information without securing a warrant. This is not and should not be the law.

Appellant contends that *Aguilar v. Texas*, *supra*, is to the contrary. We do not believe that it is. *Aguilar* is only a caveat to the general principles governing probable cause and is not a replacement of those principles. *Aguilar* was directed to the specific situation in which a warrant was based solely upon the hearsay conclusion of a third party informant, and the majority found that without elaboration of "underlying circumstances" this bare conclusion could not provide a magistrate with the substantial basis necessary for a finding of probable cause. However, there is nothing in *Aguilar* which holds that a hearsay conclusion has no probative value, and when coupled with other pieces of information that tend to substantiate the reliability of that conclusion, a valid warrant may not be issued. *Miller v. Sigler*, 353 F.2d 424 (8 Cir. 1965), cert.

denied 384 U.S. 980. In fact, footnote 1 in *Aguilar* specifically stated:

“The record does not reveal, nor is it claimed, that any other information was brought to the attention of the [magistrate]. * * * If the facts and results of such a surveillance had been appropriately presented to the magistrate, this would, of course, present an entirely different case.”

As other facts and circumstances were presented to the Commissioner in the case before us, we believe it presents “an entirely different case” and is not controlled by *Aguilar*. See, *Minovitz v. United States*, 298 F.2d 682 (D.C.Cir. 1962).

Riggan v. Virginia, 384 U.S. 152 (1966) does nothing to alter that position. The Court in *Riggan*, without opinion, struck down an affidavit which curtly recited that the application for a warrant was based upon, “personal observation of the premises and information from sources believed by the police to be reliable.”¹ Certainly, this information in *Riggan* is little, if any, better than the bare conclusion condemned in *Aguilar*; and is far less than the detailed recital found in the affidavit before us. Nor do we believe that *Gillespie v. United States*, 368 F.2d 1 (8 Cir. 1966) is determinative. In that case we held that orally stating to a magistrate that the suspect had a wagering stamp and that affiant had “obtained information that he [the suspect] was currently in the gambling business”, was insufficient probable cause for a warrant to search his residence.

Riggan and *Gillespie* set forth, at most, two evidentiary elements. *Riggan* contained: (1) personal observation (without stating what was observed), and (2) informant’s

¹ This information was taken from *Riggan v. Commonwealth*, 144 S.E.2d 298, 299 (n.1) (Va. 1965). There is nothing to indicate that the recital of facts in the opinion of Mr. Justice Clark, dissenting from the majority’s per curiam reversal was actually before the issuing magistrate.

information (without specifying the information). The *Gillespie* affiant stated: (1) Gillespie had a gambling stamp, and (2) an informant stated that Gillespie was currently in the gambling business (failing to set forth where the business was being conducted). However, in the case before us we have not two bare pieces of information, but four evidentiary facts, with each fact being explained in detail not even approximated in either *Riggan* or *Gillespie*.

Though we are convinced there was solid justification for the Commissioner's action, even if we assume this to be a close question, the Commissioner's finding is entitled to significant weight, *United States v. Ramirez*, 279 F.2d 712, 716 (2 Cir. 1960), cert. denied 364 U.S. 850, and in close cases the decisions should tip in favor of the warrant's issuance. In so holding the Court in *United States v. Ventresca*, 380 U.S. 102, 108 (1965) stated:

"If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants . . . must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. . . . Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting."

We believe this is a positive indication of the Supreme Court's unwillingness to further expand the requirements and technical burdens for a constitutional warrant and is certainly sound advice that should be heeded. In our view neither *Aguilar* or *Riggan* demand a reversal of this case. If we were to strike down the warrant now before us we would be taking a significant step beyond the specific demands of these cases and would be acting in direct derogation of the clear instructions in *Ventresca*.

If we were to demand further hyper-technical requirements we would approach the now discarded pitfalls of common law pleading in which the ritualistic recitation of a few essentially meaningless, but apparently "magical words", made the difference between a case being dismissed on a procedural technicality or justice being dispensed upon the merits.

We believe the holdings in *Aguilar* and *Gillespie* coupled with the established law for determination of probable cause sufficiently protect the privacy of individuals from hastily conceived intrusions.

The Fourth Amendment was a reaction to the evils of the use of the general warrant in England and the writs of assistance in the Colonies, and was intended to protect against invasions into the privacies of life under indiscriminate general authority. *Warden v. Hayden*, U.S. (May 29, 1967).

Certainly, we have no unjustified invasion into the privacies of Spinelli's life under a general authority. This was no haphazard intrusion into Spinelli's affairs. The agents meticulously observed his interstate travel and his attendance at the indicated scene of gambling operations, which they had investigated to the extent necessary to corroborate the information received from various sources.

There is no evidence in this case of an officious disregard of Spinelli's personal constitutional rights or any regard of harassment of Spinelli. Those engaged in illegal activities do not and should not have any greater rights than law-abiding citizens. Law enforcement officials are charged with the duty and responsibility of investigating those believed of engaging in criminal activity and a search warrant is but a legal tool of enforcement. Its efficacy should not be eroded by super-technical requirements that cause two trials, one on the issue of

proving guilt before obtaining admissible evidence by way of a search warrant—a procedural issue, and one on the issue of guilt. Probable cause protects the innocent and need not serve as a shield for the guilty.

We believe any significant increase in the demands already placed upon securing a valid warrant are unnecessary under the present law, unneeded for the protection of individual rights of privacy, and dangerous to effective law enforcement. We believe the warrant was validly issued.

EXECUTION OF THE WARRANT

After securing the search warrant from the United States Commissioner the federal officers went to the Chieftain Manor Apartments. They arrived at approximately 4:55 p.m. and stationed themselves in an apartment across the hall from the apartment to be searched. They waited until 7:05 p.m. when Spinelli was seen emerging from Apartment F. At this time Spinelli was arrested and Apartment F searched.

Appellant points to Rule 41(c) Fed. R. Crim. P., which demands that warrants "shall command the officer to search forthwith" * * *. Appellant contends that the two hour, ten minute delay in the execution of the warrant was not a "search forthwith" as required by the rule and commanded by the warrant, and the evidence seized in the search should be suppressed.

We do not agree. Rule 41(c) and (d), Fed. R. Crim. P., provide the framework for the execution of warrants in which reasonable police latitude can be exercised. Though warrants are required to command execution "forthwith", Rule 41(d) provides that "The warrant may be executed and returned only within ten days after its date." We agree with appellant that this ten-day period is the maximum under the Rule, and the require-

ment of execution "forthwith", according to the facts and circumstances of each case, may indeed require search and seizure in something less than this ten-day period. However, the rule carefully refuses to set down exactly what is meant by the term "forthwith". Presumably this was left for the courts to determine on a case-by-case basis. Consistent with this flexible approach we believe that a warrant is executed "forthwith" if it is executed within a reasonable time after its issuance, not exceeding ten days. What is a "reasonable time" must be determined by the individual circumstances of each case.

A warrant is issued upon allegation of presently existing facts, and as such does not allow execution at the leisure of the police, nor does it invest the police officers with the discretion to execute the warrant at any time within ten days believed by them to be the most advantageous. *Mitchell v. United States*, 258 F.2d 435 (D.C. Cir. 1958) (concurring opinion).

A warrant is a court order requiring the police to perform a ministerial function. They must be allowed certain leeway in the performance of this duty, but likewise they must be required to diligently perform according to the court's command. A lapse of up to ten days may be reasonable when the delay is caused by distance, traffic conditions, weather, inability to locate the person or premises to be searched, personal safety, etc. However, a delay of a few hours may be unreasonable if the police are not diligent in executing the warrant and the purpose of the delay was to prejudice the rights of a suspect.

Appellant points out that after receiving the warrant the police officers delayed execution for approximately two hours while the premises were kept under surveillance. This appellant contends was an unreasonable delay.

Certainly, at first glance, at least, the execution of a warrant on the date of issue within hours after the officers left the Commissioner's office would seem to be execution "forthwith." Neither the rule, nor the warrant require execution "immediately." While unreasonable delay cannot be countenanced, still officers must be allowed a certain latitude of action when they are on the delicate and sometimes dangerous mission of executing warrants. In this case, had the officers knocked at the door the evidence of gambling might well have been flushed down the commode before the officers could have forced their way into the apartment. In light of the necessary latitude it is very doubtful that this short delay was unreasonable and thus constituted a failure to execute "forthwith" as required by the rule and the warrant.

However, the reasonableness of the officers' conduct in this case and exactly how many hours or minutes a police officer is allowed to delay execution to the prejudice of a suspect we need not decide. To object to the failure of the police to "search forthwith" the complaining party must point to some definite legal prejudice attributable to this unjustified delay. The fact that the search uncovered prejudicial evidence does not invest standing unless the presence of the evidence is attributable to the delay. Unjustified attempts by the police to prejudice the suspect by delay in execution do not provide standing unless the police are successful in their efforts. Investigative technics of the police or hypothetical harms invest no standing to suppress evidence seized in an otherwise lawful search.

As we have upheld appellant's standing to challenge the constitutionality of the warrant even though he was in the hall outside the apartment, and since appellant has demonstrated no other possible prejudice attributable to the two hour lapse, we do not believe appellant has any proper grounds to object to the short delay.

DESCRIPTION OF THE PROPERTY SEIZED.

The warrant specified for seizure "bookmaking paraphernalia, scratch sheets, bet tabs, pay and collection sheets, bookmaking records, baseball schedules, books and records of bets received, accounts, bookmaker's ledger sheets, two telephones."

Among the items seized which appellant contends are not included in the above specified items are, an Underwood adding machine, a pencil sharpener, a stack of blank deposit tickets on the State Bank of Wellston, a G. E. AM-FM radio, \$22.00 in currency, a pair of glasses, Timex watch, pads of graph paper, four pens, two pencils, lease of the premises, and five telephones.

All of this evidence would fall, we believe, within the broad category of "bookmaking paraphernalia" set forth in the warrant. As stated in the government's brief, "Certain records are to be kept, calls to be made, computations to be determined, money to be dispensed, times to be ascertained, results to be received from various sporting engagements." All of the seized items were instrumentalities of the various facets of the bookmaking business and were properly seized as "bookmaking paraphernalia."

To the complaint that "bookmaking paraphernalia" is unconstitutionally vague, we must reply that law enforcement officials have practically no way of ascertaining in advance of a search exactly what sort of innocent, everyday materials and equipment utilized for gaming purposes might be in a private dwelling. The law cannot expect the impossible. When the circumstances of the crime make an exact description of the fruits and instrumentalities a virtual impossibility, the searching officer can only be expected to describe the generic class of items he is seeking. The degree of specificity, thus, must vary

with the circumstances and with the type of items to be seized. The specificity required for the seizure of goods whose identity is known, such as stolen goods, should not be demanded when officers are searching for such items as secreted gaming equipment, the identity of which cannot be specifically ascertained. *Calo v. United States*, 338 F.2d 793 (1 Cir. 1964); *Nuckols v. United States*, 99 F.2d 353 (D.C.Cir. 1938); cert. denied 305 U.S. 626.

We believe a warrant describing the items to be seized simply as "bookmaking paraphernalia", under the circumstances, describes with sufficient particularity the goods for which the police are searching. The items seized under the authority of this warrant, clearly being within the generic classification of "bookmaking paraphernalia", were properly received in evidence.

DENIAL OF A PRELIMINARY HEARING

Appellant was arrested on August 18, 1965. He was released on bond the next day and his preliminary hearing set for September 3, 1965. Upon motion of the government his preliminary hearing was continued. On September 15, 1965 the grand jury returned an indictment against appellant. Because of this indictment appellant was never afforded a preliminary hearing before the Commissioner. Appellant contends that the indictment should be dismissed as it was tainted by the government's willful avoidance of the preliminary hearing. We do not agree.

The right of indictment by grand jury is, of course, a constitutional protection afforded all persons accused of federal crimes. Standing alone this right could prove to be something of a handicap. Waiting for the relative slow procedure of grand jury indictment might require arrested individuals to spend long periods of time in jail on groundless charges. Rule 5(c), Fed. R. Crim. P. serves

as a complement to the constitutionally necessary grand jury system. Though the preliminary hearing provided for in Rule 5(c) may be a practical tool for discovery by the accused, the only legal justification for its existence is to protect innocent accuseds from languishing in jail on totally baseless accusations. Therefore, before the accused may be held for grand jury presentment Rule 5(c) requires the government to justify its incarceration by proving in a preliminary hearing before a judicial officer that there is probable cause to believe the accused committed the charged offense. *Barrett v. United States*, 270 F.2d 772, 775 (8 Cir. 1959). If the grand jury returns a true bill prior to the time a preliminary hearing is held, the whole purpose and justification of the preliminary hearing has been satisfied. *Vincent v. United States*, 337 F.2d 891 (8 Cir. 1964), cert. denied 380 U.S. 988. Action by a grand jury in returning the indictment brings formal charges against the accused and thus supersedes the complaint procedure and eliminates the necessity of a preliminary hearing. *Jaben v. United States*, 381 U.S. 214 (1965).

Appellant admits that the Commissioner has authority to grant continuances, but argues that to grant a continuance for the purpose of obtaining an indictment is contrary to the spirit of the rules. This very question was answered to the contrary in *Byrnes v. United States*, 327 F.2d 825, 834 (9 Cir. 1964), cert. denied 377 U.S. 970. That case held the reason behind the government's request for a continuance was speculation. Even so, the grant of a week continuance even for the purpose of allowing grand jury indictment was not improper absent a showing of legal prejudice. In the same light, we do not see anything inherently inequitable with continuing a preliminary hearing for a short period of time to allow intervening grand jury action. Though appellant might well have enjoyed the discovery benefits that flow from

a preliminary hearing, he has no absolute right to these benefits if the underlying purpose of the preliminary hearing is supplanted.

As appellant in the case before us was free on bail and the indictment was returned only twelve days after the first scheduled preliminary hearing, we believe the Commissioner was well within his discretionary rights in continuing the preliminary hearing. On this issue we need go no further.

THE INDICTMENT

Appellant charges that the indictment is laced with a multitude of defects. According to appellant 18 U.S.C. § 1952, on which the indictment is based, is so vague that it does not give adequate notice of the law and thus violates his constitutional right to due process under the Fifth Amendment. Every court faced with this argument has rejected it. The statute embraces terms of common understanding and describes a clear standard of conduct. Consequently, the statute on which this indictment is based is not unconstitutionally vague. *Bass v. United States*, 324 F.2d 168 (8 Cir. 1963); *United States v. Zizzo*, 338 F.2d 577 (6 Cir. 1964), cert. denied 381 U.S. 915; *Turf Center, Inc. v. United States*, 325 F.2d 793 (9 Cir. 1963); *United States v. Smith*, 209 F.Supp. 907 (E.D. Ill. 1962).

Though the indictment makes its charge in one count and is framed in the language of 18 U.S.C. § 1952 appellant alleges that it violates Rule 7(c) Fed. R. Crim. P., which requires "plain, concise and definite written statement of the essential facts constituting the offense charged." An indictment couched in the terms of the statute, as this one is, is usually considered to comply with the rule. *Reynolds v. United States*, 225 F.2d 123 (5 Cir. 1955), cert. denied 350 U.S. 914; *Brown v. United States*, 222 F.2d 293 (9 Cir. 1955).

An indictment is good if it informs the defendant of the offense with which he is charged with sufficient specificity to enable him to prepare his defense and protects him against future jeopardy. *Rood v. United States*, 340 F.2d 506 (8 Cir. 1965), cert. denied 381 U.S. 906. We believe this indictment, framed in the terms of the statute, measures up to that standard. *Turf Center, Inc. v. United States*, 325 F.2d 793 (9 Cir. 1963); *United States v. Teemer*, 214 F.Supp. 952 (N.D. West Va. 1963).

In much the same vein appellant alleges that the trial court should have required the government to elect precisely under what provision of the statute appellant was being charged. According to appellant the indictment charges a multitude of sins and the government should elect as to whether appellant was promoting, or managing, or establishing or carrying on the unlawful activity designated. Rule 14, Fed. R. Crim. P., governing joinders, gives a District Court the power to grant the "relief justice requires", but is framed in permissive, not mandatory language. The grant of relief requiring the government to narrow its charge or elect the precise segments of the statute on which it is relying is a matter resting in the sound discretion of the trial court, the exercise of which is not subject to review unless abused. *Pointer v. United States*, 151 U.S. 396 (1894). As we held, the indictment adequately informed the accused of the charges against him. The slight difficulty of preparing a defense to such broadly worded charges does not outweigh the difficulty and potential prejudice faced by the government in being forced to limit its presentations to a restricted area of proof. No abuse of discretion has been shown.

In an attempt to approach this problem from an alternate route, appellant moved that the government supply him with a bill of particulars pursuant to Rule 7(f) Fed. R. Crim. P. The excellent opinion of Judge (later Justice)

Whittaker in *United States v. Smith*, 16 F. R. D. 372, 374-375 (W. D. Mo. 1954), establishes the general principles in this regard. It is the proper office of a bill of particulars,

"to furnish to the defendant further information respecting the charge stated in the indictment when necessary to the preparation of his defense, and to avoid prejudicial surprise at the trial", and when necessary for those purposes, is to be granted even though it requires 'the furnishing of information which in other circumstances would not be required because evidentiary in nature,' * * *."

This liberal policy was followed when the trial court granted partial relief to appellant by ordering the government to inform him of the location, dates, and method of operation of the alleged gambling activity. This, we believe, furnished appellant with the additional information necessary to prepare his defense and avoid prejudicial surprise.

The balance of appellant's requests, however, were properly denied. A refused portion of appellant's motion sought information as to the "exact nature and details of the manner in which" the promotion, management, establishment, carrying on, and facilitating the gambling activity was performed. As the government was under order to advise appellant of the necessary facts in connection with charge, he was properly informed.

On the other hand, the granting of appellant's request would have the severely damaging effect of "freezing" the government's evidence in advance of trial. See, 8 Moore's Federal Practice, § 7.06 [1]. The denial of this request for supplementary evidence was not an abuse of the trial court's broad discretion in this area. *Wong Tai v. United States*, 273 U.S. 77, 82 (1927).

Appellant also desired to discover from the government exactly how the government believed § 563.360 of the Mis-

souri Revised Statutes was violated. The text of the statute is, of course, available to appellant, and he was also informed as to the exact dates, location and alleged method of illegal activity. Requiring the government to specify exactly how it believed appellant violated this state statute would be to require the government to disclose either its legal theory of the case or furnish unnecessary evidentiary facts as to appellant's method of operation. In either case this is not information normally securable by a bill of particulars, and thus the trial court did not abuse its discretion when the motions pertaining to this request was denied. *United States v. Ansani*, 240 F.2d 216 (7 Cir. 1957), cert. denied 353 U.S. 936; *Kempe v. United States*, 151 F.2d 680, 685 (8 Cir. 1945), cert. denied 331 U.S. 843.

Finally, appellant sought in his motion the names and addresses of other persons allegedly engaged in this gambling activity. This is a thinly veiled request for the identity of potential witnesses, and the government is not normally required to supply such information to the criminal defendant. The trial court's denial of this request was well within its permissive powers. *Bohn v. United States*, 260 F.2d 773 (8 Cir. 1958), cert. denied 358 U.S. 931.

Appellant contends that the indictment did not charge a crime within the spirit or intent of § 1952, as he was, at most, a single small-time gambler not engaged in an interstate business enterprise. Section 1952 makes it a federal crime to travel in interstate commerce with the intent to promote unlawful activity and thereafter attempt or commit the unlawful act. Congress defined "illegal activity" to mean, among other things, "any business enterprise involving gambling . . . in violation of the laws of the state in which [it was] committed." Other than requiring the unlawful activity, as it applies to gambling, it must be a "business enterprise."

Congress made no attempt to differentiate the business enterprises of a national crime syndicate and a petty hoodlum. No attempt was made to establish a minimum number of individuals that had to be involved, nor was a necessary dollar amount placed upon the illegal activity. It is virtually impossible for us to judicially specify in any meaningful fashion how large an operation a racketeer must have before he comes within the spirit of the clear prohibitions of this section. As long as it is established that a defendant is engaged in a proscribed gambling activity as a "business enterprise", we will make no attempt to draw a line between the "big time" operator, who is admittedly subject to the federal prohibitions, and the "small" operator, who, according to appellant, should remain immune from the demands of the law.

Though the statute was admittedly enacted to curb interstate racketeering, the purposes of the statute are well served by thwarting the small time interstate racketeer before he has a chance to expand his illegal activities. Therefore, if the government can establish the interstate travel with the requisite intent and the illegal "business enterprise" no attempt will be made by us to exempt the less prosperous entrepreneurs from the operation of this statute.

The evidence indicates that Spinelli was not a casual offender engaging in a Friday night game of cards with some friends in Missouri. He was a racketeer committing regular and significant violations of the Missouri law. He made regular and repeated trips across the state line, and over a long period of time was involved in a very substantial gambling business. The prosecuting officials did not abuse their powers by bringing charges against Spinelli and the trial court properly sustained the validity of the charge.

Appellant has rather vaguely attacked the constitutionality of § 1952, on which the indictment is based, by

simply listing without explanation the various constitutional provisions he believed this statute violates.

1. We have already held that the statute gives proper notice and is therefore not unconstitutionally vague.

2. There is no equal protection of law running against actions of the federal government. And the fact that a federal criminal statute is based in part upon conduct proscribed by state law does not violate due process simply because of variations in the law of the several states. *Turf Center, Inc. v. United States*, 325 F.2d 793 (9 Cir. 1963). See also, *Clark Distilling Company v. Western Maryland Railway Company*, 242 U.S. 311 (1917).

3. The statute regulating interstate travel for the purpose of engaging or controlling illegal activity is within the interstate regulatory powers vested in the federal government, and therefore is not a usurpation of the powers reserved to the states by the Tenth Amendment. *United States v. Ziezzo*, 338 F.2d 577 (7 Cir. 1964), cert. denied 381 U.S. 915; *United States v. Kelley*, 254 F.Supp. 9 (S.D.N.Y. 1966); *United States v. Ryan*, 213 F.Supp. 763 (D. Colo. 1963).

4. The substantive violation of this statute took place when appellant crossed into Missouri with the requisite intent and thereafter attempted or committed an illegal act in Missouri. The crime was, therefore, committed in Missouri. Appellant was tried in the United States District Court for the Eastern District of Missouri. Appellant's allegation of a violation of his Sixth Amendment right to be tried in the district in which the crime was committed, has obviously not been violated.

5. As appellant has not alleged that he has been tried on this charge before, the allegation of double jeopardy has no present basis. As we have held that the statute and the indictment adequately state the nature of the proscribed conduct with which Spinelli is charged, he is

fully protected against future jeopardy on these charges. He is further protected from repeated jeopardy by the fact that the allegation of violation of § 1952 is in the conjunctive. The general verdict thereon will bar any further prosecutions with respect to any of the particular allegations embraced in the broad wording of the charge. *Turf Center, Inc. v. United States*, *supra*.

6. Finally, we do not see, nor has appellant pointed out any critical relationship between the prohibitions of this statute and the First Amendment freedoms of assembly and speech. While protecting all forms of valid expression, this Amendment does not protect antisocial conduct which the government has a valid interest in proscribing. *United States v. Smith*, 209 F.Supp. 907 (E. D. Ill. 1962).

We believe the statute is constitutional and an indictment based thereon is valid.

POST ARREST STATEMENTS

Appellant was arrested at approximately 7:05 p. m. and was placed in the City Jail. The following morning he was brought before the United States Commissioner and in the presence of his attorney was advised of his constitutional rights. Bail was set by the Commissioner. Thereafter, while appellant was being processed for release he was asked by Deputy United States Marshal Whiflock where he lived. Spinelli gave an Illinois address. Upon release he presented himself to F. B. I. Agent Bender and asked for the return of some keys. He indicated that one of the keys was to the "residence or the place where he was staying on the east side [Illinois]." Both of these incidents were related at trial and were introduced to prove appellant's Illinois residence and consequently the interstate travel necessary for a federal crime. Appellant objects to this evidence on the basis of the decisions in *Miranda v. Arizona*, 384 U.S. 436 (1966); and *Escobedo v. Illinois*, 378 U.S. 478 (1964).

Appellant was tried and convicted in March, 1966. *Miranda v. Arizona* was decided June 13, 1966. *Johnson v. New Jersey*, 384 U.S. 719 (1966) decided that *Miranda* should have prospective application only. Thus, *Miranda* need play no part in the consideration of the case before us. *Escobedo v. Illinois* pre-dated Spinelli's trial and its requirements would apply if applicable to the issue raised.

The exclusionary rule found in *Escobedo*, as in many other cases, is founded largely upon the proposition that the government must respect the constitutional rights of its citizens. To protect individual rights the evidence obtained in derogation thereof is not admissible in the courts. Therefore, for the exclusionary rule to apply herein, appellant need prove some unconstitutional actions by governmental officials.

In *Escobedo* the defendant was not brought before a magistrate or advised of his right to remain silent. Even though he specifically requested the advice of his attorney and his attorney was in the building attempting to see the defendant, the request for counsel was denied.

The actions of the governmental agents in the case before us can, in no way, be equated with the denial of counsel in the *Escobedo* case. A short time after being presented to the Commissioner and advised of his rights in the presence of his attorney, Spinelli voluntarily gave an Illinois address to Deputy Marshal Whitlock for the purpose of being released on bond. No request for advice or for counsel was made or denied. This request for administrative information necessary for release from custody is proper and is completely unlike and unrelated to the serious abuses found in *Escobedo*.

Furthermore, we do not believe this request for information violates appellant's Fifth Amendment privilege against self-incrimination. Appellant was not required to

ask for release on bond; but if released the governmental officials have a right and duty to the public to know where appellant can be found. Appellant need not answer the questions put to him if he feels they might lead to his incrimination, but once he has decided to answer he may not retroactively claim that his privilege has been violated. Neither *Escobedo*, nor any other case of which we are aware, forbids the asking of questions simply because they could produce incriminating evidence.

Appellant argues that he was coerced into incriminating himself because his refusal to answer would have resulted in his being denied bail. Though we admit that appellant was faced with a difficult choice, it was a choice that necessarily had to be made. Address information prior to release on bond is an absolute necessity for the efficient administration of the bail system. When asked for this information the accused must weigh the competing circumstances and decide which course he should take.

In much the same way the accused must decide whether to testify at trial and subject himself to cross examination or remain silent. Simply because certain advantages are to be gained by waiving Fifth Amendment rights does not mean that their waiver was coerced. The advantage which flows as a consequence of the law must be distinguished from coercive promises or threats from individual police officers. If an accused decides as a matter of free will to furnish information necessary and relevant to obtain a release on bail, it does not follow as a matter of constitutional law that this information was coerced from him.

The second statement, the one given to Agent Bender, was given after Spinelli had been released on bond. This information was volunteered and not the result of any interrogation. Furthermore, as appellant was free on

bond the conversation did not take place while defendant was in the custody of the police. *Escobedo* simply has no application to this set of circumstances.

It is our conclusion that neither of the pieces of evidence were obtained in violation of appellant's right to counsel or in derogation of his freedom from self-incrimination. See, *United States v. Zizzo*, 338 F.2d 577 (7 Cir. 1964) cert. denied 381 U.S. 915. As Spinelli's trial preceded the decision in *Miranda v. Arizona*, we need not decide whether the positive duties placed upon arresting officers would affect the admissibility of the evidence herein.

ADMISSION OF EVIDENCE

The admission or rejection of offered evidence is a matter generally left largely within the discretion of the trial court. *Cotton v. United States*, 361 F.2d 673, 676, (8 Cir. 1966). We have viewed appellant's two objections to the admission of evidence and feel neither warrants a finding by us that the trial court abused its discretion.

Appellant objected to expert testimony of an F. B. I. agent concerning the gambling paraphernalia seized from the apartment. After first being qualified as an expert on gambling the government witness identified, interpreted and explained to the jury the various exhibits and in the course of his testimony offered his opinion that these exhibits were used in the recording of wagers. Appellant contends this testimony usurped a duty of the jury.

An examination of the record indicates that gambling in the form practiced herein is a complex business using markers, codes and symbols. It is an area, we believe, little understood by, if not completely unintelligible to, the average juror. We believe explanation and interpretation of these exhibits to the jury is almost an absolute

necessity if they are to reach an enlightened verdict. As such, we believe this is a proper area in which expertise may be exercised, and a properly qualified expert may offer his opinion on relevant matters concerning the operation of a gambling enterprise. *United States v. Altieri*, 343 F.2d 115, 119 (7 Cir. 1965), vacated on other grounds 382 U.S. 367; *State v. Saussele*, 265 S.W.2d 290, 296 (Mo. 1954).

While appellant admits that evidence of criminal acts other than the one charged may be introduced to show intent or other element of the charged offense (See, *United States v. Compton*, 355 F.2d 872 (6 Cir. 1966), cert. denied 384 U.S. 951) he contends that evidence of gambling which took place at a different location in St. Louis some seven months earlier is too remote to be admissible. We disagree.

Two important elements of the charged crime are travel with the necessary intent and the existence of an illegal gambling "business enterprise". The prior connection of appellant to gambling activity conducted elsewhere tends to prove the lack of innocent purpose in his present venture. It further tends to prove that he was involved in a continuing "business enterprise" rather than a single incident of gambling.

The remoteness of the time and place are primarily matters going to the weight rather than the admissibility of the evidence. Only if the remoteness destroys the probative worth of the evidence, need it be rejected, and this is a matter left to the discretion of the trial court. *King v. United States*, 144 F.2d 729 (8 Cir. 1944), cert. denied 324 U.S. 854. We do not believe we can say as a matter of law that the passage of seven months places the prior activity at a time so remote that it destroys the probative value of the evidence to a degree that the trial court abused its discretion in admitting it. See, *Medrano v. United States*, 285 F.2d 23 (9 Cir. 1960), cert. denied 366 U.S. 968.

INSTRUCTION

Among other things § 563.360 of Missouri Revised Statutes, 1959 provides: " * * * [A]ny person who in this state records or registers a bet or wager or sells pools upon the results of any trial or contest * * * shall, on conviction, be adjudged guilty of a felony * * *."

The Court instructed the jury as follows:

"If you, the jury, find and believe from the evidence and beyond a reasonable doubt that the defendant did *engage in accepting wagers on athletic contests and in furnishing odds or point spreads on athletic contests as a business enterprise*, then I instruct you that such activity violates the law of Missouri, as set out in Section 563.360 of the Missouri Revised Statutes of 1959."

Appellant alleges that this instruction is erroneous in that the Missouri law does not declare to be illegal "the furnishing of odds and point spreads on athletic contests."

The statute does forbid the registering of bets and the selling of pools, and the instruction on "accepting wagers" correctly related the law of Missouri on this point. Further, a necessary included part of "accepting wagers" might well be the furnishing of odds and point spreads. Though not specifically forbidden by the wording of the statute this is but a facet and part of the broader prohibition against gambling.

Furthermore, the language appellant finds objectionable required the government to prove not only the acceptance of wagers, as this was all that was necessary to prove a state law violation, but required the government to prove that appellant had furnished odds and point spreads. Rather than expanding the statute as appellant charges, the government was required to assume an unnecessary burden of proof, which was mere surplusage that inured to the benefit of appellant.

SUFFICIENCY OF THE EVIDENCE

In determining sufficiency of evidence to support a verdict of guilty, the evidence must be viewed in a light most favorable to the government. We believe the evidence so viewed validly supports appellant's conviction.

There are three basic elements to the federal crime charged:

1. Interstate travel;
2. Intent (to promote, direct, or manage illegal business);
3. Overt act (in attempting or participating in the illegal business).

Appellant admits the sufficiency of the evidence of his interstate travel, but contests the sufficiency of the evidence indicating intent at the time of travel or the overt act following the travel.

To prove intent the government properly introduced evidence of appellant's involvement in a prior gambling operation which took place some seven months before the offense charged herein. The evidence of the present violation indicates that appellant periodically visited this apartment, and it indicates that gambling operations were obviously taking place therein. Though there is some evidence that appellant came into Missouri to visit his broker, certainly there is sufficient evidence allowing the jury to infer that the purpose of the trip was motivated by the gambling operation. This was an issue of fact resolved by the jury against appellant and it will not be disturbed by us.

Proof of the overt act is indicated by inference from proof of appellant's numerous visits to this apartment and proof that this apartment was the scene of recent and comprehensive gambling activities. On the day of

his arrest appellant had a key to the door of this apartment and was in the room alone with this gambling paraphernalia for well over two hours. This evidence would certainly allow the jury to infer that after crossing into Missouri with the requisite intent, appellant attempted or committed acts in the promotion, management, establishment or carrying on of gambling activity in violation of Missouri law. All that needs to be proved is some overt act directed to the illegal gambling activity. It is not necessary that appellant actually be witnessed placing or receiving a wager. The evidence supports the conviction.

Judgment affirmed.

HEANEY, Circuit Judge, with whom VAN OOSTERHOUT, Circuit Judge, concurs, dissenting:

We respectfully dissent. In our opinion, the decisions of the United States Supreme Court in *Riggan v. Virginia*, 384 U.S. 152 (1966), *United States v. Ventresca*, 380 U.S. 102 (1965) and *Aguilar v. Texas*, 378 U.S. 108 (1964), and the decision of this Court in *Gillespie v. United States*, 368 F.2d 1 (8th Cir. 1966), require a reversal of the District Court as the affidavit submitted in support of the search warrant did not provide a substantial basis for its issuance.

The majority opinion concedes that the "visits" to the apartment, the presence of the two telephones in the searched apartment, and the affiant's personal knowledge that the defendant was a known gambler are, at the most, established suspicions. As such, they are not sufficient to constitute probable cause for the issuance of a search warrant. *Locke v. United States*, 7 CRANCH. 339 (1819); See *Pigg v. United States*, 337 F.2d 302, 305 (8th Cir. 1964); *Cochran v. United States*, 291 F.2d 633, 636 (8th Cir. 1961).

It argues, however, that the "suspicions" were ripened into probable cause by the affiant's statement that the F.B.I. had been informed by an unidentified reliable informant that Spinelli is "operating a handbook and accepting wagers and disseminating wagering information" by means of the two telephones assigned numbers WY-down 4-0029 and WYdown 4-0136.

Conversely, it argues that the "suspicions" served to corroborate the conclusions of the unidentified informant and establish his reliability.

We cannot agree with either contention.

The Fourth Amendment's right¹ of the people to be secured against the unreasonable searches of their persons, houses,² papers, and effects, *Mapp v. Ohio*, 367 U.S. 643 (1961); *Weeks v. United States*, 232 U.S. 383, 392 (1914), extends to the guilty as well as the innocent. *McDonald v. United States*, 335 U.S. 451, 453 (1948); *Hobson v. United States*, 226 F.2d 890, 892 (8th Cir. 1955).

While the use of search warrants is to be encouraged, *United States v. Ventresca, supra*, a magistrate must perform his duties neutrally; he "must not serve as a rubber stamp for the police." *Id.* at 109; *Aguilar v. Texas, supra*

¹ The Fourth Amendment reads:

"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The policy expressed in this amendment finds expression in Rule 41 of the Federal Rules of Criminal Procedure.

² The Supreme Court has refused to uphold otherwise unreasonable criminal searches merely because commercial, rather than residential, premises were the object of the police intrusions. *See v. City of Seattle, ... U.S. ..., 18 L.Ed.2d 943 (1967); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931); Amos v. United States, 255 U.S. 313 (1921); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).*

at 111; *Giordenello v. United States*, 357 U.S. 480, 486 (1958); *Johnson v. United States*, 333 U.S. 10, 14 (1948).

"... It is not the magistrate's function, therefore, merely to determine whether the official seeking the warrant believes that probable cause exists; rather, the magistrate must ask whether the facts presented persuade him that there is probable cause. . . ."

Rogers v. Warden, No. 30874, 2d Cir., June 15, 1967, pp. 2504-2505.

A proceeding by search warrant is a drastic one, *Sgro v. United States*, 287 U.S. 206, 210 (1932), and must be carefully circumscribed: *Boyd v. United States*, 116 U.S. 616 (1886).

With these general principles in mind, we consider whether the magistrate here had probable cause to issue a warrant to search Apartment F of the Chieftain Manor Apartments.

As the only information before the magistrate when he issued the search warrant was that set forth in the affidavit, the sufficiency of the affidavit must be determined from its face. *Aguilar v. Texas*, *supra* at 109, n. 1; *Giordenello v. United States*, *supra*.

While hearsay may be the basis for the issuance of a search warrant, *Jones v. United States*, 362 U.S. 257, 272 (1960), if it is relied upon to establish probable cause, the magistrate must be informed of some of the underlying circumstances supporting the affiant's conclusions, and his belief that any informant involved was credible or his information reliable. *United States v. Ventresca*, *supra*; *Rugendorf v. United States*, 376 U.S. 528 (1964); *Gillespie v. United States*, *supra*. See Annot. 10 A.L.R.3d 359 (1966).

Applying the standards set forth in *Ventresca*, *Rugendorf* and *Gillespie* to the informant's statement in the present case, it is clear that it was not sufficient to justify

a finding of probable cause by the magistrate. The affidavit in which it was contained:

(1) Failed to set forth any basis upon which the magistrate could form an independent opinion of the informant's reliability, or on which he could find that the informant had furnished information in the past which had proved to be reliable.

In *McCray v. Illinois*, 18 L.Ed.2d 62 (1967), where the Supreme Court found the informant to be reliable, the informant had furnished information to police officers forty or more times, which information had proved to be reliable in the past and had resulted in conviction.

And, in *Rogers v. Warden*, *supra*, rev'd on other grounds, the Second Circuit found the unidentified informant to be reliable on the basis that the affidavit indicated that he had furnished information in the past which had resulted in three convictions. Compare *United States v. Robinson*, 325 F.2d 391 (2d Cir. 1963); and *Cochran v. United States*, *supra*, where the reliability of an informer was held not to have been established.

In *Cochran*, Chief Judge Vogel, writing for this Court, declared:

" . . . An uncorroborated tip by an informer whose identity and reliability are both unknown does not constitute probable cause to make an arrest." *Contee v. United States*, 1954 [94 U.S. App. D.C. 297], 215 F.2d 324, 327." *Id.* at 636.

The affidavit in the present case contained only a simple allegation that the unidentified informant was reliable. There was nothing in it from which the magistrate could have determined that the informant had furnished reliable information in the past, nor were any facts set forth from which such an inference could be drawn. *United States v. Follette*, 267 F.Supp. 337, 342 (S.D. N.Y. 1967); See *State ex rel. Dunn v. Tahash*, 147 N.W.2d 382 (1966).

(2) Failed to (a) indicate whether the informant spoke on the basis of his personal knowledge, or (b) to outline any of the underlying circumstances upon which the unidentified informant based his statement that illegal activity was taking place on the premises searched.

(a) In *Riggan v. Virginia*, *supra*; *Aguilar v. Texas*, *supra* at 109; and *Gillespie v. United States*, *supra* at 3, the informant's statements were substantially the same as the one here.³ In *Aguilar*, the Court, in pointing out that the affidavit failed to indicate whether the informant spoke from his own personal knowledge, stated:

"The vice in the present affidavit is at least as great as in *Nathanson* and *Giordenello*. Here the 'mere conclusion' that petitioner possessed narcotics was not even that of the affiant himself; it was that of an unidentified informant. The affidavit here not only 'contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein,' it does not even contain an 'affirmative allegation' that the affiant's unidentified source 'spoke with personal knowledge.' For all that appears, the source here merely suspected, believed or concluded that there were narcotics in petitioner's possession. The magistrate here certainly could not 'judge for himself the persuasiveness of the facts relied on . . . to show probable cause.' He necessarily accepted 'without question' the informant's 'suspicion,' 'belief' or 'mere conclusion.' " *Id.* at 113-14.⁴

³ In *Aguilar v. Texas*, 378 U.S. 108 (1964), the affidavit in relevant part read:

"Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law."

⁴ The majority opinion urges that the informant's statement to the affiant that Spinelli was "operating a handbook and accepting wagers and disseminating wagering information by means of the telephones (numbered) WYdown 4-0029 and WYdown 4-0136,"

(b) The same Court, in laying down the need for the magistrate to be informed of some of the underlying circumstances supporting the informant's conclusions, stated:

"... the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see *Rugendorf v. United States*, 376 U.S. 528, 11 L.Ed.2d 887, 84 S.Ct. 825, was 'credible' or his information 'reliable.' Otherwise, 'the inferences from the facts which lead to the complaint' will be drawn not 'by a neutral and detached magistrate,' as the Constitution requires, but instead, by a police officer 'engaged in the often competitive enterprise of ferreting out crime,' *Giardenello v. United States*, supra, 357 U.S. at 486, 2 L.Ed.2d at 1509; *Johnson v. United States*, supra, 333 U.S. at 14, 92 L.Ed. at 440, or, as in this case, by an unidentified informant." *Id.* at 114-15.

In *United States v. Ventresca, supra*, where the Court found that the underlying circumstances had been adequately set forth, the affidavit stated that the informants, unidentified Revenue Agents, had smelled fermenting mash outside the premises searched on August 18th and 30th; saw bags of sugar being delivered to the premises on July 28th, August 2nd, 7th and 16th; and observed tin cans being taken to and from the premises on August 11th, 16th, 24th and 28th. The Court cautioned:

"This is not to say that probable cause can be made out of affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists without detailing any of the 'underlying circumstances' upon which that belief is, based. See *Aguilar v. Texas, supra*. Recital of some

was a statement of fact and not a conclusion. We believe it to be a statement similar to that in the *Aguilar* affidavit which the Supreme Court referred to as a conclusion.

of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police. . . . " *Id.* at 108-109.

See *United States v. Conti*, 361 F.2d 153 (2d Cir. 1966) (where the affiant personally placed bets with the defendant).

(3) Failed to indicate when the informant became aware of the fact that illegal activities were taking place in the apartment, or when the informant gave this information to the affiant. The fact that the affidavit and the informant's statement was couched in the present tense does not satisfy this requirement. See *Sgro v. United States*, *supra* at 210-211; *Schoeneman v. United States*, 317 F.2d 173 (D.C.Cir. 1963).

In *Rosencranz v. United States*, 356 F.2d 310 (1st Cir. 1966), the leading case on the issue of time, the affidavit for the search warrant read, insofar as material, as follows:

" . . . he has reason to believe that on the premises . . . there is now being concealed certain property, namely mash fit for distillation, apparatus for the purpose of distillation and nontax paid alcohol which are held in violation of Title 26 USC Sec. 5601, (a), (1), (6), (7), (8), (12):

"And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

"1. Information given anonymously to the Affiant that the aforementioned materials are being held on said premises.

"2. The detection of a strong odor of mash outside the premises by the Affiant." *Id.* at 312, n. 1. (Emphasis added.)

The Court there held that the affidavit was not sufficient to establish probable cause because it did not contain

an averment as to the time when the affiant received information from his anonymous informant, or the time when the affiant detected the odor of the mash. It stated that the use of the present tense was not sufficient. The Court, after making a detailed examination of the cases dealing with this question, stated:

" . . . The present tense is suspended in the air; it has no point of reference. It speaks, after all, of the time when an anonymous informant conveyed information to the officer, which could have been a day, a week, or months before the date of the affidavit. To make a double inference, that the undated information speaks as of a date close to that of the affidavit and that therefore the undated observation made on the strength of such information must speak as of an even more recent date would be to open the door to the unsupervised issuance of search warrants on the basis of aging information. . . . Indeed, if the affidavit in this case be adjudged valid, it is difficult to see how any function but that of a rubber stamp remains for them.

" . . . It is one thing to expect the magistrate to give a commonsense reading to facts set forth and to draw inferences from them. It is quite another thing to expect the magistrate to reach for external facts and to build inference upon inference in order to create a reasonable basis for his belief that a crime is presently being committed." *Id.* at 316-17.

In the present case, although the affiant's statement indicates when he saw Spinelli traveling from Illinois to Missouri, and when he observed him visiting the apartment complex and the apartment, it is silent as to when the affiant learned from the informant that Spinelli was using the phones in Apartment F for illegal activities, or when such activity took place. Just as the *Resendrane* Court stated that it could not infer from the date of the

affidavit that the information had been passed at or near that date,⁵ we cannot infer from this affidavit that the anonymous information was transmitted to the affiant at or near the date the warrant was requested, nor can we infer that the informant's "knowledge that the two phones were being used by Spinelli" was correct. Thus, the informant's statement here, as in *Rosencrans*, is "suspended in the air."⁶

In summary, we do not believe that the unidentified informant's statement to the affiant can be used for any purpose. Not only did the affidavit fail to establish the reliability of the informer, but there was no showing that the informer spoke from his own personal knowledge. None of the underlying circumstances supporting the informer's belief were set forth, and the affidavit failed to indicate when he received or passed on the information that Spinelli was conducting gambling activities over the two phones in question. While we do not agree with the majority that the informant's reliability was established by his knowledge of the existence of the phone numbers in the apartment searched, even if this view is accepted, the informant's statement is totally unacceptable for the other stated reasons.⁶

⁵ Judge Coffin asks a pertinent question in *Rosencrans*:

"... But suppose a commissioner, on the basis of an affidavit . . . were to infer that both affiant's information and observation were recent, while at a hearing on a motion to suppress, affiant states that both information and observation were several months old. There would, in fact, have been no basis for issuing the warrant, and yet the affidavit would have been accurate and the affiant would be in no danger of prosecution for its falsity. . . ." *Id.* at 317.

* The majority opinion cites *Jones v. United States*, 362 U.S. 257 (1960); *Rosencrans v. United States*, 356 F.2d 310 (1st Cir. 1966); and *Hodgdon v. United States*, 365 F.2d 697 (8th Cir. 1966), in support of the proposition that the hearsay information obtained from the unidentified informant had been sufficiently corroborated here to establish probable cause. A reading of these cases indicates that in each case, either the informant or the

Nor do we believe that the facts stated in the affidavit, obtained by the affiant through surveillance, rise above the level of suspicion whether considered with or without the informant's conclusion.

(1) Interstate travel between East St. Louis, Illinois, and St. Louis, Missouri, is surely so common that it cannot be viewed as establishing an unusual pattern of travel from which illegality can be inferred. Compare *Travis v. United States*, 262 F.2d 477 (9th Cir. 1966) (defendant established a definite pattern or *modus operandi*); and *Hernandez v. United States*, 353 F.2d 624 (9th Cir. 1965).⁷

affiant had personally observed illegal activities in or near the premises to be searched.

Thus, in *Jones*, the informant stated that he had purchased narcotics from the defendant in the defendant's apartment on a number of occasions, the most recent one being a day prior to the issuance of the search warrant. He detailed precisely where in the apartment the narcotics were kept.

In *Rosencrans* (reversed on other grounds), the informant's conclusory statement, that the defendant was operating a still, was corroborated by the personal observations of the affiant (a law enforcement agent) who smelled the strong odor of mash outside of the premises of the appellant.

And in *Hodgdon*, the informant (a U.S. Court Commissioner) told the affiant (a law enforcement officer) that he had been threatened with a gun the previous day by the defendant while alone in his office with the defendant.

⁷ A large number of facts coalesced in *Hernandez v. United States*, 353 F.2d 624 (1965), to form probable cause for the arrest and search of the defendant's bags. Los Angeles police had observed a recurring pattern in incidents involving illicit transportation of marihuana. Large lots were being brought to Los Angeles from Mexico by auto, then carried from Los Angeles to New York City in the luggage of persons traveling on commercial air flights. It was established that the couriers (1) were Latin Americans, (2) traveled first class, (3) traveled on non-stop flights, (4) made no advance reservations, (5) carried new and expensive luggage, (6) carried luggage which usually bore the brand name "Ventura," (7) carried luggage which usually had combination locks, (8) carried luggage which was exceedingly heavy because of the weight of the marihuana, and (9) paid their fares and weight overcharges in cash with bills in large denominations. Eight such cases had been investigated in the two years preceding the appellant's apprehension. Airport employees were asked to notify

(2) Four observed visits to the apartment complex and one such visit to Apartment F, absent *any* showing of activity indicating that bookmaking activities were taking place in the apartment, does not, in our judgment, add support for a probable cause finding.

The Second Circuit, in *Rogers v. Warden, supra* (reviewing a petition for habeas corpus), effectively overruled a decision of the New York Court of Appeals where the facts indicated that a police officer had personally observed four known addicts and nine other persons entering or leaving the premises searched over a two-day period, even though the affidavit, as here, stated that the affiant had received information from an informant, known to be reliable, that the defendant, and others were selling narcotics in the first floor and basement apartment.⁸ The

the police if a person fitting the described pattern appeared. The appellant appeared, was arrested, his bags searched, and a large quantity of marihuana was uncovered. In commenting on the search and seizure, the Court, at 628, stated:

"... The circumstances upon which Sergeant Butler relied were within his knowledge *before* the search was initiated, and were sufficient to justify a reasonable man in believing that the very bags which he did search contained marihuana."

⁸ The affidavit in *Rogers v. Warden*, No. 30874, 2d Cir. June 15, 1967 p. 2495, n. 1, read in part:

"1. I am a detective assigned to the Brooklyn District Attorney's Off.

"2. I have information based upon confidential information received from an an [sic] informant known to be reliable and accurate [sic] and whose information in the past has led to the arrest and conviction of three persons. The information is that Jimmy Rogers and other persons found in said apartment are selling narcotic drugs in the 1st fl. & basement apartment of premises 191 Quincy St., Brooklyn, N. Y. Observations by the deponent of the premises on Thursday, January 10, 1963, between the hours of 8:00 and 9:00 P.M. five unknown males and two known male addicts were seen entering the premises; on January 11th, 1963, from 9:00 to 11:00 A.M. four unknown males and two known male addicts.

"By reason of the aforesaid the deponent has probable cause to believe that narcotic drugs and paraphernalia commonly used by drug sellers and addicts may be found at the afore-

Court, in holding that the warrant failed to establish probable cause, stated:

"... there is not a hint in the present affidavit that the informant had seen any trafficking in narcotics taking place in Rogers' apartment. It is difficult for us to understand, therefore, the basis for the inference drawn by the Appellate Division and the New York Court of Appeals that the informant spoke of what he had seen, for the 'deficiencies [in the affidavit] could not be cured by the . . . reliance upon a presumption that the complaint was made on the personal knowledge of the [informant].'"
Id. at 2509.

* * * * *

"Since it is apparent that Rogers lived in an 'apartment' building, it is obscure, vague and at the very least equivocal whether Gowski actually observed the unknown males and known addicts entering Rogers' 'apartment,' or whether he merely saw them entering the 'premises,' . . ." *Id.* at 2511.

* * * * *

"It can be argued, of course, that when Gowski stated that he had observed the 'premises,' he was really talking about the 'apartment.' We recognize that affidavits are often hastily drawn and that we cannot expect a police officer to draft an affidavit with the skill and precision of a lawyer. . . . Nevertheless, the simple fact remains that from the affidavit before us, neither we nor the magistrate who issued the warrant could be reasonably certain what it was that the officers observed, and there is nothing

said premises and upon the persons found therein.

"3. Based upon the foregoing reliable information and upon my personal knowledge there is probable cause to believe that such property, to wit, narcotic drugs and paraphernalia commonly used by drug addicts and sellers and [sic] may be found in the possession of Jimmy Rogers and upon the persons found therein or at premises first floor and basement of 191 Quincy Street, Brooklyn, N. Y."

to indicate that the magistrate attempted to make any inquiries to resolve the ambiguity that existed. . . ." *Id.* at 2513.

The issuance of a search warrant must be based on more specific evidence than was provided in the present instance. As we stated earlier, in *United States v. Ventresca, supra*, government agents *smelled* the odor of fermenting mash in the vicinity of the suspected dwelling, and *observed* other activities suggesting the operation of a still. In *Miller v. Sigler*, 353 F.2d 424, 426-7 (8th Cir. 1965), the affiant *smelled* the odor of marihuana outside the premises searched on a number of occasions. In *Biondo v. United States*, 348 F.2d 272-3 (8th Cir. 1965), the defendant was *observed* carrying racing forms into the apartment. In *United States v. Pinkerman*, 374 F.2d 988, 990 (4th Cir. 1967), the affiant *saw* barrels and *smelled* mash outside the premises. In *United States v. Ramirez*, 279 F.2d 712-15 (2d Cir. 1960), the affiant personally *saw* quantities of white powder he believed to be heroin in the apartment to be searched two days before the warrant was issued. In *United States v. Rugendorf, supra*, a reliable informant told the affiant he *saw* furs, alleged to have been stolen, in the defendant's basement a few days before the search.⁹

* In *United States v. Jordan*, 349 F.2d 107 (6th Cir. 1965), the officers *observed* the transfer of jugs and *smelled* the odor of mash emanating from the premises. In *United States v. Freeman*, 358 F.2d 459 (2d Cir. 1966), the heroin was *seen* within the premises to be searched by the informant. In *United States v. Grosso*, 358 F.2d 154 (3rd Cir. 1966), known numbers operators were *observed* depositing envelopes and brown paper bags in a car near a cemetery. In *Irby v. United States*, 314 F.2d 251 (D.C. Cir. 1963), the affiant *observed* the government's special employee taking money from known addicts and the employee turned over narcotics obtained with the money prior to the issuance of a warrant. In *United States v. Gorman*, 208 F.Supp. 747 (E.D. Mich. 1962), several others engaged in handbook activities were *seen* entering the apartment alone or with the defendant. In *United States v. Whiting*, 311 F.2d 191 (4th Cir. 1962), a convicted gambler was *observed* making contact with the defendant under suspicious cir-

(3) The fact that two telephones were located in the vested apartment does not, in this day and age, in the absence of some specific evidence of how the phones were used or the presence of unusual equipment, constitute probable cause for the issuance of a search warrant. *United States v. Gebell*, 209 F.Supp. 11 (E.D. Mich. 1962); See *United States v. Menser*, 360 F.2d 199, 203 (2d Cir. 1966); *United States v. Nicholson*, 303 F.2d 330 (6th Cir. 1962), compare *United States v. Gorman*, 208 F.Supp. 747-48 (E.D. Mich. 1962), where numerous long distance telephone calls with known bookmakers were consummated over the phones in question; *Biondo v. United States*, *supra* at 274, where unusual telephonic equipment was in use; and, *United States v. Conti*, *supra*, where the affiant placed bets by making a phone call to the apartment searched.

(4) The fact that the appellant was known to the affiant and other law enforcement agents as a bookmaker, and an associate of bookmakers, would, if supported by some credible evidence, be a factor which a magistrate might consider, *Jones v. United States*, *supra* at 271, but here, we have no such supporting evidence.

The majority relies heavily on *McCray v. Illinois*, *supra*; and *Draper v. United States*, 358 U.S. 307 (1959), in support of its opinion. We believe that these cases do not support a finding of probable cause here; rather, we feel that they suggest a contrary result.

At the outset, we point out that *Draper* was followed by *Aguilar v. Texas*, *supra*; *Beck v. Ohio*, 379 U. S. 89

cumstances by the affiant. In *United States v. Suarez*, No. 30883, 2d Cir., July 12, 1967, the affidavit related that the reliable informant had provided information on at least 100 occasions over the past one and one-half years and had observed heroin in the apartment to be searched. See *United States v. Ramos*, No. 31239, 2d Cir., July 12, 1967, and *United States v. Perry*, No. 30620, 2d Cir., July 12, 1967, where the affidavit contained information comparable to that in *United States v. Suarez*, *supra*.

(1964); *United States v. Ventresca, supra*; and most recently by *McCray v. Illinois, supra*. Thus, *Draper* must be read in light of these subsequent cases. There are several factors which distinguish *Draper* from the present case:

(1) In *Draper*, the informant was a *named* special employee of the federal narcotics agents;¹⁰ here, the informant was unidentified.

(2) In *Draper*, the informant had given reliable information to the federal agents on numerous occasions over a six-month period, and the information had *always* been found to be reliable. Here, we have a mere allegation of reliability.

(3) In *Draper*, the informant told the arresting officer, on September 3rd, that the defendant had taken up residence in the city, and was peddling narcotics to several residents of the city. Four days later, the informant told the arresting officer that the defendant had gone to Chicago the day before, and that he would bring back three ounces of heroin; and that he would return on the morning of September 8th or 9th. He described in exact detail the defendant's dress and baggage.

Here, the informant gave no information as to when Spinelli had used the telephones for illegal purposes, or when they would be so used in the future, nor does the affidavit indicate when the informant told the F.B.I. Agent that Spinelli "is using the phones for gambling."

(4) Finally, the information supplied by the informant in *Draper* is so precise that it obviously came from one intimately familiar with the defendant's activities; while

¹⁰ Justice Goldberg, speaking in *United States v. Ventresca*, 380 U.S. 102, 111 (1965), stated:

"... Observations of fellow officers of the Government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number. . . ."

here, the information from the informant regarding the phone numbers in Apartment F is of such a general nature that it could have been obtained from any one of a number of sources, including the phone book, or another unidentified informant.

Five years after *Draper*, Justice Stewart, speaking for the Court in *Beck v. Ohio*, *supra*, where it refused to find probable cause, focused on the essential elements in *Draper* which caused the Court to find probable cause for the arrest. Justice Stewart declared:

“ . . . But in that case the record showed that a named special employee of narcotics agents who had on numerous occasions given reliable information had told the arresting officer that the defendant, whom he described minutely, had taken up residence at a stated address and was selling narcotics to addicts in Denver. The informer further had told the officer that the defendant was going to Chicago to obtain narcotics and would be returning to Denver on one of two trains from Chicago, which event in fact took place. . . . ”
Id. at 95.

In *Beck*, the arresting officer had a police photo of the suspect, knew what the suspect looked like, knew that the petitioner had a record in connection with clearing house schemes and schemes of chance, and had received information regarding the suspect's activities from an undisclosed source. In reversing the conviction, the Court said:

“ . . . But the officer testified to nothing that would indicate that any informer had said that the petitioner could be found at that time and place. Cf. *Draper v. United States*, 358 US 307, 3 Led2d 327, 79 SCt 329. And the record does not show that the officers saw the petitioner ‘stop’ before they arrested him, or that they *saw, heard, smelled or otherwise perceived anything else* to give them ground for belief that the petitioner had acted or was then acting unlawfully.” *Id.* at 94. (Emphasis added.)

* * * * *

" . . . All that the trial court was told in this case was that the officers knew what the petitioner looked like and knew that he had a previous record of arrests or convictions for violations of the clearing house law. Beyond that, the arresting officer who testified said no more than that someone (he did not say who) had told him something (he did not say what) about the petitioner." *Id.* at 96-97.

Beck was followed by *McCray*, where the Supreme Court also found probable cause. In doing so, it noted that the unidentified informant had given information to the police on at least forty prior occasions; the information had resulted in a number of convictions; the informant personally observed the defendant selling narcotics and immediately informed the police, who proceeded forthwith to where the affiant had seen the defendant, and after observing the defendant, arrested him.

When *Draper*, *Beck* and *McCray* (all non-warrant cases) are considered together, they indicate that the Supreme Court will find probable cause where the informant is shown to be reliable, the information furnished by him is precise as to time and place, and is either based on the informant's personal knowledge or is so specific as to indicate that the informant is intimately familiar with the defendant's operations, and the police have acted promptly upon receiving the informant's tip.

Here, there is no showing that the unidentified informant had submitted reliable information to the police in the past. The information furnished by him was conclusory in nature, and it does not appear that it was based on his personal knowledge. And, finally, the affidavit does not indicate whether the police acted promptly on receipt of the information from him.

CONCLUSION

We share the feelings of our colleagues that affidavits presented to a magistrate, to establish probable cause for the issuance of a search warrant, must be viewed in a commonsense matter.

When we read the affidavit here, at least three commonsense questions occur to us. We feel the same questions ought to have occurred to the magistrate.

- (1) How did the affiant know that the informant was reliable?
- (2) How did the affiant know that Spinelli was using the two telephones to conduct his operations in Apartment F?
- (3) When did the informant obtain this information; and when did he transmit it to the affiant?

We cannot believe that we are being hypertechnical by insisting that these basic questions be answered.

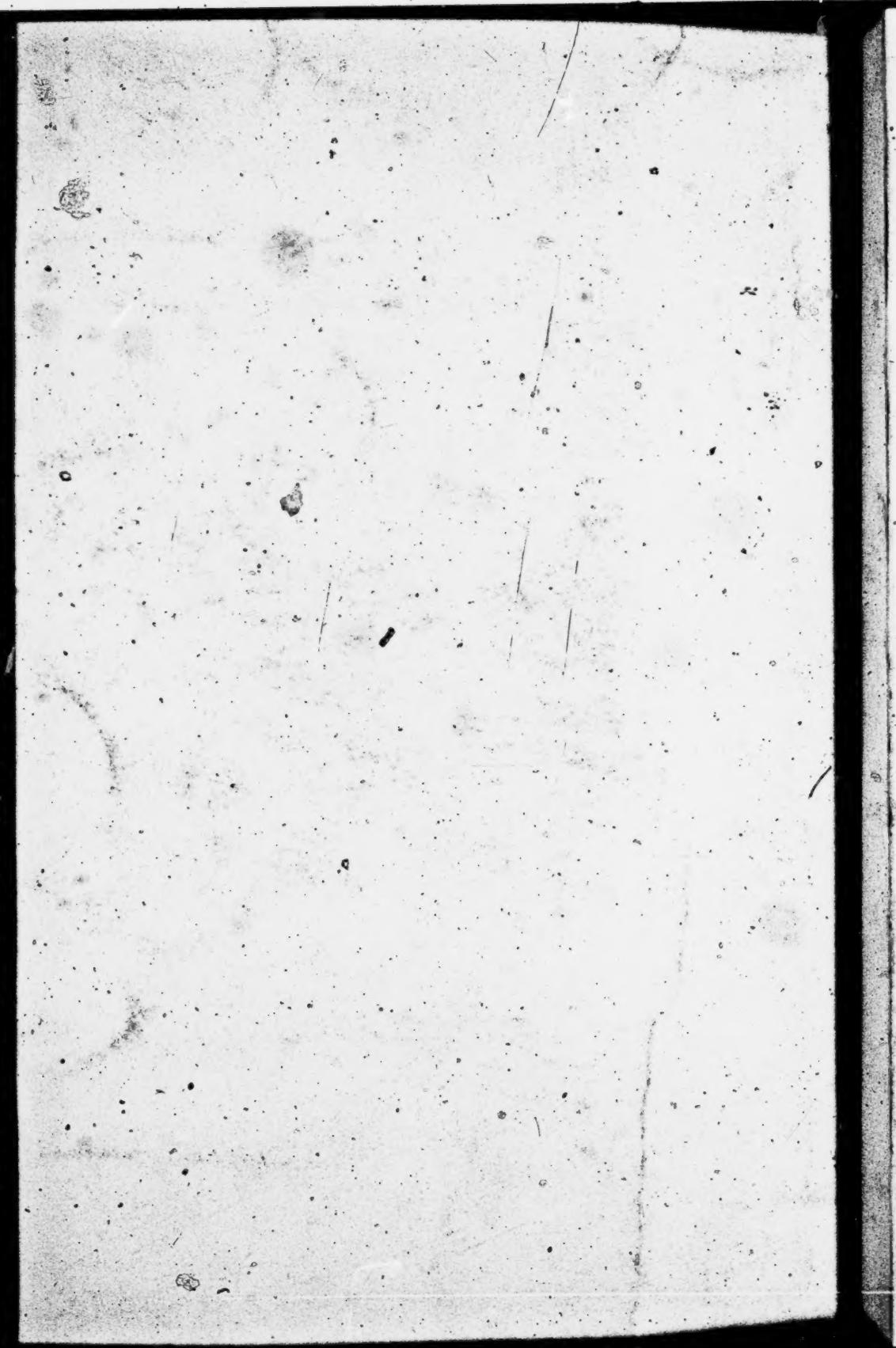
It is important that the use of search warrants be encouraged. It is equally important that magistrates satisfy themselves that there is reasonable cause for believing that illegal activity is taking place on the premises to be searched before issuing search warrants.

We concur with the majority that the defendant had standing; but as it is our belief that probable cause did not exist for the issuance of the search warrant and as this determination is dispositive of the case, we express no opinion on the other issues raised by the appellant.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.



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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968

WILLIAM SPINELLI,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit.

IRL B. BARIS,
NEWMARK and BARIS,
721 Olive Street,
St. Louis, Missouri 63101,
Attorney for Petitioner.



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NO.

IN THE
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OCTOBER TERM, 1967.

WILLIAM SPINELLI,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
for the Eighth Circuit.

William Spinelli, your petitioner, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled cause on July 31, 1967.

OPINIONS BELOW.

This cause was originally argued before a division of the United States Court of Appeals for the Eighth Circuit. On February 1, 1967, the division rendered its decision, reversing petitioner's conviction, in a majority

opinion written by Circuit Judge Heaney and concurred in by Circuit Judge Van Oosterhout. A dissenting opinion was written by Circuit Judge Gibson. Upon petition of the Government, this decision, which has not been officially reported, was subsequently withdrawn and a rehearing before the Court en banc was ordered. Copies of the division opinions are reproduced in Appendix A.

After reargument before the Court en banc, a decision was rendered on July 31, 1967, affirming petitioner's conviction. The majority opinion was written by Circuit Judge Gibson for six members of the Court. A dissenting opinion was written by Circuit Judge Heaney in which Circuit Judge Van Oosterhout concurred. These opinions have not yet been officially reported. Excerpts of these opinions are reported at 36 L. W. 2127 and 1 Cr. L. 1074, 2308. The majority and dissenting opinions are reproduced in Appendix B.

Certain orders were entered by District Judge Harper in ruling on various pre-trial motions filed by petitioner. These orders were not officially reported and are reproduced in Appendices E, F and G.

JURISDICTION.

The judgment of the United States Court of Appeals was entered on July 31, 1967 (Appendix L). A timely petition for rehearing filed by petitioner was denied on September 12, 1967 (Appendix M). On October 2, 1967, Mr. Justice White extended the time for filing a petition for writ of certiorari herein to and including November 11, 1967.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1) and Rule 37 (c) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED.

I.

Whether the Government has a right to petition a United States Court of Appeals for rehearing where the Court of Appeals decision reversed petitioner's conviction because a motion to suppress illegally seized evidence should have been sustained by the District Court.

II.

Whether an affidavit of an F. B. I. agent in support of a search warrant and based upon information furnished by an unidentified informant is consistent with the Fourth Amendment to the Constitution of the United States and provides probable cause for issuance of the search warrant, even though it does not allege:

- A. underlying circumstances corroborating the information furnished by the informant, or
- B. proof of the credibility of the alleged informant himself with facts concerning his prior use and reliability, or
- C. facts showing that the informant spoke with personal knowledge, or
- D. the time when the informant learned his information and when he conveyed it to a colleague of the affiant, or
- E. all of the essential elements of the alleged offense, or
- F. facts as to the commission of a federal offense.

III.

Whether an officer, armed with a search warrant commanding him to search premises forthwith, may, after arriving at the premises to be searched, delay its execution for a period of time, without explanation as to the reason

for such delay and, if the officer may delay, whether the officer must satisfactorily explain the reason for such delay or whether the person challenging the search must prove prejudice resulting from the delay.

IV.

Whether the term "bookmaking paraphernalia" in a search warrant is sufficiently specific and particular to justify the seizure of an adding machine, pencil sharpener, blank bank deposit slips, radio, currency, glasses, watch, paper, pens, pencils, apartment lease, and telephones.

V.

Whether one of the purposes of a preliminary examination is to afford an accused an opportunity to hear some of the evidence against him, and whether the Government is entitled to a continuance of the preliminary examination for the obvious reason of presenting the matter to the Grand Jury and thereby avoiding the examination and depriving the accused of the right to hear evidence in advance of trial.

VI.

Whether the indictment against petitioner was constitutionally deficient in that it:

- A. was vague, uncertain, indefinite, ambiguous and duplicitous, and
- B. charged a multitude of offenses, and
- C. failed to apprise petitioner of the particulars of the offense, and
- D. as applied to petitioner, authorized his conviction for an offense outside the spirit and intent of 18 U. S. C., § 1952, and
- E. was based upon a statute which is unconstitutional.

VII.

Whether statements made by petitioner, after his arrest, employment of counsel and appearance before the Commissioner, and required of him as a condition precedent to return of his personal belongings and to his release on bail, were constitutionally inadmissible under Massiah v. United States and related cases.

VIII.

Whether the admission of testimony of an alleged expert witness, including his expression of opinions that a handbook was being operated, bets were being received, a line was being disseminated, and other information was being furnished, constituted an invasion of the province of the jury and deprived petitioner of a trial free from inadmissible evidence.

IX.

Whether the admission of testimony concerning another handbook operation in another part of the City seven months prior to that charged, without evidence connecting the two alleged operations, deprived petitioner of a trial free from inadmissible evidence.

X.

Whether, in a jury instruction pertaining to the violation of Missouri law, the inclusion of offenses not prohibited or not proved, makes the instruction erroneous.

XI.

Whether lack of positive evidence of essential elements of the offense charged against petitioner, his intent and the commission of an overt act, except such as may possibly be created by inferences based upon inferences, vitiates petitioner's conviction.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES OF COURT INVOLVED.

The constitutional provisions, statutes, and rules of court involved are the following, all of which are set forth in Appendix C:

The Constitution of the United States, First, Fourth, Fifth, Sixth and Tenth Amendments;
18 United States Code, §§ 1952 and 3731;
Missouri Revised Statutes, 1959, § 563.360;
Federal Rules of Criminal Procedure, Rules 5 (c),
7 (c), 14, 41 (c), 41 (d), and 41 (e).

STATEMENT.

Petitioner was tried by a jury and convicted in the United States District Court for the Eastern District of Missouri. Federal jurisdiction was based upon the indictment returned by the Federal Grand Jury charging that petitioner, between August 6, 1965, and August 18, 1965, traveled in interstate commerce from Illinois to Missouri with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment and carrying on of an unlawful activity, a business enterprise involving gambling, violating Section 563.360 of the Missouri Revised Statutes, 1959, and that petitioner thereafter performed and attempted to perform acts to promote, manage, establish, carry on, and facilitate the promotion, management, establishment and carrying on of said unlawful activity, all in violation of Title 18, United States Code, Section 1952. Petitioner was sentenced to imprisonment for three years and a fine of \$5,000.00 (Tr. 325).*

* References to the transcript of the proceedings at the trial and post-trial hearing on the motion for new trial and sentencing will be designated "Tr.". References to the transcript of testimony in connection with petitioner's pre-trial motions will be designated "M".

The evidence material to this petition is summarized as follows:

In November, 1964, two telephones were installed at Apartment F, 9745 Pauline Place, St. Louis, Missouri, under the names of a Ross family. This service was discontinued on March 15, 1965 (Tr. 23-26). In January, 1965, petitioner's automobile was seen in the vicinity of 9745 Pauline Place and he was observed at the apartment premises (Tr. 30-32). A woman who lived below Apartment F testified that she heard telephone conversations and other activity through the floor (Tr. 41-42). F. B. I. Agent Dowd testified at considerable length to conversations which he overheard on January 12 and 13, 1965, while sitting in the bedroom in the apartment below Apartment F. These conversations involved dollar amounts, places and other figures (Tr. 60-79) which were compared with basketball games listed in a local newspaper (Tr. 69-71, 75-81). There were two men in Apartment F at times while the Agent was listening. They addressed each other as "Jack" and "John" (Tr. 73, 82) but he did not know who actually was doing the talking (Tr. 92). Subsequently, petitioner was seen leaving the apartment and driving in the vicinity (Tr. 97-102, 137-138). Petitioner was not arrested at Pauline Place (Tr. 136, 151).

In November, 1964, two telephones were installed at 1108 Indian Circle Drive, Apartment 7, in Olivette, Missouri (a suburb of St. Louis), the telephones being listed under the name of Mrs. Grace P. Hagen (Tr. 114-115). Mrs. Hagen was not further identified and there was no credit information on her in telephone company files (Tr. 120). There was no evidence of any use made of the telephones until they were disconnected on August 18, 1965.

There was no evidence of any activities of petitioner between January 13, 1965, and the end of July, 1965. There

was evidence that on various dates between August 6, 1965, and August 18, 1965, petitioner was observed leaving a residence in Fairview Heights, Illinois, and driving his automobile to one of the bridges leading to St. Louis. This usually occurred in the morning and he entered the bridge around noontime or shortly before noon (M. 3-6, Tr. 121-125). There was also evidence, to which petitioner objected, that the car was parked on the east or Illinois side during early morning hours between July 22 and August 5, 1965 (Tr. 125-127).

On the days that petitioner was seen to drive onto the bridges, he was also observed exiting from the bridges on the St. Louis side. Later, on these and other occasions, petitioner or his car was seen in the vicinity of 1108 Indian Circle Drive (M. 21-22, 33-34, Tr. 141-143, 160-163). On one occasion petitioner was seen entering Apartment F (M. 37, Tr. 134). There was usually a period of four hours between the time petitioner was seen leaving the bridge and the time he was seen in the vicinity of Indian Circle Drive. He was never followed for more than a few blocks after he left the bridge and it took about thirty minutes to drive from the bridge to Indian Circle Drive (M. 18-19, 24, Tr. 152-153). Petitioner produced evidence that upon leaving the bridge he generally spent several hours at a stock broker's office in downtown St. Louis (Tr. 245-247).

On August 18, 1965, after observing petitioner leave the Eads Bridge, the agents prepared an affidavit for a search warrant which was issued by the United States Commissioner for a search of Apartment F at 1108 Indian Circle Drive (M. 7, 25-26). A copy of the affidavit is attached hereto as Appendix D.

The agents arrived at the building at approximately 4:55 P. M., and went into Apartment H across the hall from Apartment F, and waited until 7:05 P. M. At that

time they saw petitioner leaving Apartment F and the agents emerged from Apartment H and arrested him (M. 14, 26-27, Tr. 143-145). A search of petitioner's person revealed some keys, one of which opened the door to Apartment F (M. 20, Tr. 147). Petitioner was taken downtown and booked while other officers remained on the premises and conducted a search (M. 12, Tr. 147). No effort was made to break into the door or to arrest petitioner between 4:55 and 7:05 P. M. (M. 18, Tr. 155-156). While the search was being conducted, John Vainikos entered the apartment with a key but was not arrested (M. 28, Tr. 184).

The agents who conducted the search of the premises first took photographs and then seized a number of items from the premises (M. 28-29, Tr. 166-170, 173-180). These items consisted of pieces of paper, written notations, money, telephones, adding machine, pencils and paper, a lease, radio, pencil sharpener, glasses, wristwatch, and publications pertaining to baseball games. Most of the items were sent to the F. B. I. Laboratory in Washington (Tr. 181).

The seized exhibits were identified and explained by an F. B. I. Agent from Washington. Petitioner's objection to his qualifications was overruled (Tr. 199). He identified the papers as being associated with a handbook operation and explained their use and purpose and related some of the betting tabs to sports events listed in the newspapers (Tr. 200-217). He was also permitted over petitioner's objection to express opinions that baseball and horse bets were being taken (Tr. 217). As a handwriting expert, he made some handwriting tests but could not say that the papers were written by petitioner (Tr. 220-221), and he could not tell who wrote the bulk of the writing (Tr. 228-229). The items of evidence were also examined for fingerprints in Washington, but they failed to disclose any latent fingerprints (Tr. 230).

After his arrest petitioner was taken downtown and was released on bail the following day. Over objection of petitioner, the F. B. I. Agent testified that petitioner identified one of the keys taken from his possession as being to a residence where he stayed on the east side (Tr. 150). When he was released on bail he gave an address in Caseyville, Illinois, to the Deputy United States Marshal, who testified that petitioner could not be released on bail without giving an address (Tr. 236-237).

The matter was set before the United States Commissioner on September 3, 1965, but the preliminary examination was continued at the request of the Government so that the matter could be presented to the Grand Jury. Petitioner objected to the postponement of the preliminary examination, insisting that he was entitled to such an examination.

On September 15, 1965, petitioner was indicted, it being charged that between August 6, 1965, and August 18, 1965, he traveled in interstate commerce from the State of Illinois to the State of Missouri with the intent to carry on a business enterprise involving an unlawful activity, to-wit, gambling in St. Louis County, Missouri, in violation of Section 1952, Title 18, United States Code. Petitioner filed several motions with reference to this indictment, including a motion to dismiss based upon the ground that the indictment failed to allege any overt acts subsequent to travel. On November 18, 1965, the original indictment was dismissed at the Government's request because it was superseded by a second indictment, which was the indictment on which petitioner was tried.

After the second indictment, petitioner filed several pre-trial motions. The motion to dismiss the indictment was overruled, the motion to suppress indictment and for other appropriate relief was overruled, the motion to require United States to elect was overruled, the motion

to suppress evidence was overruled on the ground petitioner had no standing to protest the search,* and the motion for bill of particulars was sustained in part and overruled in part. (See Appendix E and F.) The bill of particulars filed by the Government made reference to dates earlier than August 6, 1965, and referred to the location at 9745 Pauline Place. Petitioner then filed a motion to strike portions of the bill of particulars and to require further particulars, which motion was sustained in part by striking the earlier dates and the reference to 9745 Pauline Place. (See Appendix G.) At the trial, the Government, over petitioner's objection, was permitted to introduce the above-mentioned evidence of the earlier dates pertaining to Pauline Place.

At the close of all of the evidence petitioner filed a motion for judgment of acquittal upon which the Court reserved ruling.

The jury returned a verdict of guilty. After petitioner's motion for judgment of acquittal or, in the alternative, motion for new trial was overruled, he duly appealed to the United States Court of Appeals for the Eighth Circuit. The cause was originally argued before and decided by a division of the Court consisting of Circuit Judges Heaney, Van Oosterhout and Gibson.

On February 1, 1967, the division rendered a 2-1 decision, in which Judge Heaney wrote the majority opinion with the concurrence of Judge Van Oosterhout, and Judge Gibson wrote a dissenting opinion. (See Appendix A.) Judge Heaney held that the affidavit upon which the search warrant was issued did not provide the basis for probable cause. Therefore, the search warrant and the search were violative of the Fourth Amendment to the

* The Court of Appeals unanimously ruled that petitioner did have standing. The government's petition for rehearing after the divisional opinion of February 1, 1967, did not question this ruling by the Court of Appeals.⁶

Constitution of the United States. Petitioner's conviction was reversed. (See Appendix H.)

The Government filed a petition for rehearing en banc or, in the alternative, for a rehearing. This petition was granted and the rehearing was ordered before the Court en banc. (See Appendix I and J.) Petitioner and the Government submitted supplemental briefs and the cause was then reargued before the Court en banc. At the re-argument, petitioner questioned the jurisdiction of the Court en banc to rehear the matter because of the lack of authority for the filing of a petition for rehearing by the Government.

On July 31, 1967, the Court of Appeals en banc affirmed the conviction by a 6-2 vote. (See Appendix K and L.) The majority opinion written by Judge Gibson overruled the jurisdictional question as to the right of the Government to petition for rehearing, and overruled all of petitioner's arguments. Judge Heaney, with the concurrence of Judge Van Oosterhout, wrote a dissenting opinion on the search and seizure question. (See Appendix B.)

Thereafter petitioner filed a petition for rehearing before the Court of Appeals en banc, but this petition was denied without opinion on September 12, 1967. (See Appendix M.)

REASONS FOR GRANTING THE WRIT.

Petitioner believes that there are numerous reasons for review on writ of certiorari of the decision of the Court of Appeals. Eleven major questions have been presented for review. The reasons why petitioner believes these questions should be reviewed by the Court are:

1. The decision of the Court of Appeals is in conflict with decisions of other Courts of Appeals. (See Questions II, V, VIII, IX and XI.)

2. The decision of the Court of Appeals rules on an important state question in a way in conflict with applicable state law. (See Question X.)

3. The decision of the Court of Appeals decides important questions of federal law which have not been, but should be, settled by this Court. (See Questions I, III, IV and VI.)

4. The decision of the Court of Appeals has decided federal questions in ways in conflict with applicable decisions of this Court. (See Questions II and VII.)

5. The rehearing of this cause by the Court of Appeals departed from the accepted and usual course of judicial proceedings, and guidelines thereon should be established by this Court for the benefit of the Courts of Appeals. (See Question I.)

In the order in which the questions have heretofore been presented, they will now be discussed in this argument so as to amplify the reasons why petitioner believes it is important for this Court to review the decision of the Court of Appeals on each of these questions. (For the convenience of this Court, petitioner will restate each question presented prior to the argument.)

I.

Whether the Government has a right to petition a United States Court of Appeals for rehearing where the Court of Appeals decision reversed petitioner's conviction because a motion to suppress illegally seized evidence should have been sustained by the District Court.

On February 1, 1967, the division of the Court of Appeals, by a 2-1 decision, reversed petitioner's conviction on the ground that evidence had been illegally seized and petitioner's motion to suppress the evidence should have been sustained. (See Appendix A and H.) Thereafter the

Government's petition for rehearing en banc or, in the alternative, for a rehearing was granted, and a rehearing was ordered before the Court en banc. (See Appendix I and J.) Petitioner believes that the Government did not have the right to file a petition for rehearing, but the Court of Appeals rejected petitioner's argument.

So far as we can determine, this precise point has never been ruled by this Court or any other court. Thus, we have an important question of federal law which has not been, but should be, settled by this Court.

The Court of Appeals seems to rely for authority upon the review granted to the Government by this Court in *United States v. Ventresca*, 380 U. S. 102. However, the Ventresca opinion does not indicate that the Government's right to review was questioned by the defendant there.

Granting the Government a right of rehearing is contrary to the spirit of the Fifth Amendment prohibition against double jeopardy. *Forman v. United States*, 361 U. S. 416, which seemingly rejects the double jeopardy argument and which is cited by the Court of Appeals, should be limited to its facts because the effort there was not, as here, to reverse the earlier Court of Appeals opinion but merely to change the final mandate. The Forman case also does not discuss the effect of 18 U. S. C., § 3731, which sets forth the statutory right of the Government to appeal.

If the District Court had initially ruled as the Court of Appeals said on February 1, 1967, that it should have ruled and sustained the motion to suppress the evidence, the Government clearly would not have been entitled to appellate review of such ruling. See *Carroll v. United States*, 354 U. S. 394. Inasmuch as 18 U. S. C., § 3731 does not grant the right to the Government to appeal from a District Court ruling suppressing evidence, there is no

reason why the Government should have a greater right when the matter reaches the Court of Appeals. The opinion of the Court of Appeals is at least entitled to the same degree of finality as is afforded an opinion of the District Court.

The Court of Appeals did not discuss *Sapir v. United States*, 348 U. S. 373. We believe this decision, and especially the concurring opinion of Mr. Justice Douglas, sustains our position that once the Court of Appeals ordered the conviction reversed because the motion to suppress should have been sustained, the Government had no further right to rehearing. This is so whether the right to review is limited by the Fifth Amendment or by the statutory restrictions on Government appeals.

For the reason that this is an important matter of first impression and that the Court of Appeals has departed from the accepted course of judicial proceedings by giving the Government a right to appeal that it does not legally possess, we respectfully submit that certiorari should be granted as to Question I.

II.

Whether an affidavit of an F. B. I. agent in support of a search warrant and based upon information furnished by an unidentified informant is consistent with the Fourth Amendment to the Constitution of the United States and provides probable cause for issuance of the search warrant, even though it does not allege:

- A. underlying circumstances corroborating the information furnished by the informant, or
- B. proof of the credibility of the alleged informant himself with facts concerning his prior use and reliability, or
- C. facts showing that the informant spoke with personal knowledge, or

- D. the time when the informant learned his information and when he conveyed it to a colleague of the affiant, or
- E. all of the essential elements of the alleged offense, or
- F. facts as to the commission of a federal offense.

The judges of the Court of Appeals differed as to the validity of the search warrant and the affidavit in support of it. (For the convenience of this Court, we have included the entire affidavit of F. B. I. Agent Bender in Appendix D.) The sharp differences of opinion are readily apparent from the majority and dissenting opinions rendered on February 1, 1967, and July 31, 1967. See Appendix A and Appendix B. We believe that the last majority opinion is erroneous for numerous reasons hereinafter detailed and is in conflict with decisions of other Courts of Appeals and of this Court.

A. The affidavit of F. B. I. Agent Bender stated: "The Federal Bureau of Investigation has been informed by a confidential reliable informant that William Spinelli is operating a handbook and accepting wagers and disseminating wagering information by means of the telephones which have been assigned the numbers WYdown 4-0029 and WYdown 4-0136." This was the only allegation in the entire affidavit of any illegal activity by petitioner. The mere conclusions of the informant are not sufficiently corroborated to justify the issuance of the search warrant.

The majority opinion seems to hold that there is corroboration in the allegations of repeated interstate travel; repeated visits at the apartment, the existence of two telephones, and affiant's reputation as a gambler. Whatever facts are detailed in the affidavit do not, however, corroborate the conclusion of the informant that petitioner was engaged in unlawful activities. Interstate travel, visiting an apartment, and two telephones do not constitute illegal conduct. There was no factual corroboration of

the alleged illegal activity, the operation of a handbook. As said in **Aguilar v. Texas**, 378 U. S. 108, 114:

"Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, **Jones v. United States**, 362 U. S. 257, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were . . ." (or here, that William Spinelli was operating a handbook, etc.).

In the Aguilar case, the affidavit stated that the officers had received reliable information from a credible person that narcotics were being stored. The language of the affidavit is almost identical to that in the instant affidavit. The language of the Aguilar opinion is equally applicable to the present case (l. c. 113-114):

"The vice in the present affidavit is at least as great as in **Nathanson** and **Giordenello**. Here the 'mere conclusion' that petitioner possessed narcotics (was operating a handbook) was not even that of the affiant himself; it was that of an unidentified informant. The affidavit here not only 'contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein', it does not even contain an 'affirmative allegation' that the affiant's unidentified source 'spoke with personal knowledge.' For all that appears, the source here merely suspected, believed or concluded that there were narcotics in petitioner's possession (that defendant was operating a handbook). The magistrate here certainly could not 'judge for himself the persuasiveness of the facts relied on . . . to show probable cause.' He necessarily accepted 'without question' the informant's 'suspicion,' 'belief' or 'mere conclusion.' "

Compare the detail contained in the affidavit in **United States v. Ventresca**, 380 U. S. 102, in which the search warrant was sustained.

In **Riggan v. Virginia**, 384 U. S. 152, this Court in a per curiam order reversed the lower court judgment on the authority of the Aguilar case. The dissenting opinion indicated the contents of the affidavit, which had far more detail than the affidavit in the present case.

We believe that the majority opinion is in conflict with numerous decisions of this Court, including the foregoing, which set forth the principle that if hearsay allegations originating from an unidentified informant are relied upon in an affidavit for a search warrant, the underlying circumstances supporting the allegations must be set forth, or the affidavit will be insufficient to show probable cause.

B. As stated in the Aguilar case, *supra*, at 114-115:

“... the magistrate must be informed of ... some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see **Rugendorf v. United States**, 376 U. S. 528, was ‘credible’ or his information ‘reliable.’ Otherwise, ‘the inferences from the facts which lead to the complaint’ will be drawn not ‘by a neutral and detached magistrate,’ as the Constitution requires, but instead, by a police officer ‘engaged in the often competitive enterprise of ferreting out crime,’ **Gordanell v. United States**, *supra*, at 486; **Johnson v. United States**, *supra*, at 14, or as in this case, by an unidentified informant.”

Whether the requirements of a credible informant and reliable information are conjunctive or disjunctive is immaterial in the instant case because there is neither. As pointed out in part A hereof, the affidavit contained nothing to corroborate the information and to show that it

was reliable. There was no specific detail furnished by the alleged informant and repeated in the affidavit concerning the operation of the alleged handbook. It was, at the most, an unsupported conclusion.

With reference to the credibility of the informant there were no allegations to indicate any prior use of this informant. The affidavit stated that "the Federal Bureau of Investigation has been informed by a confidential reliable informant" of certain information. (It is significant that the agent who made the affidavit did not even allege that he had received this information—only that the F. B. I. had been informed.) There was nothing in the affidavit nor anything presented to the Commissioner which proved the credibility of the informant as required by the Aguilar and subsequent cases. The majority opinion does not point out any underlying circumstances of his credibility and seemingly is satisfied that the hearsay information came from one "sworn to be reliable".

There was here nothing on the credibility of the informant similar to the prior use of the informant which was found sufficient in **McCray v. Illinois**, 386 U. S. 300, and **United States ex rel. Rogers v. Warden**, 2 Cir., 381 F. 2d 209.

C. As previously noted, the Aguilar case, quoting from **Giordenello v. United States**, 357 U. S. 480, 486, stated that the affidavit not only "contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein," but it did not even contain an affirmative allegation that the unidentified source spoke with personal knowledge. This deficiency is similarly apparent in the affidavit in this case. There is nothing to indicate that the informant's conclusion as to petitioner's alleged illegal activity was based on the informant's personal knowledge, such as, by placing a wager, or personally receiving wagering information, or

actually seeing the handbook in operation. And, of course, the affiant Bender had no such personal knowledge; in fact, he himself did not even receive the information directly from the informant.

The majority of the Court of Appeals completely disregarded this requirement of personal knowledge. It conflicts, by its silence, with the applicable decisions of this Court.

D. The majority opinion fails to comment on the fact that the affidavit did not allege the time of the occurrence of the information furnished by the informant, or the time that he learned of it, or the time of receipt of such information by the Federal Bureau of Investigation. In this connection, the opinion is in conflict with **Rosencranz v. United States**, 1 Cir., 356 F. 2d 310. There it was held that the use of the present tense was not sufficient to overcome the deficiency in failing to aver the time when the informant became aware of the law violation or the time when he conveyed this information to the affiant. The omission of time is all the more significant in a proceeding involving Section 1952 of Title 18, U. S. C., because the overt act must occur after the travel. (As originally introduced, Section 1952 did not require a subsequent overt act, but Congress amended the law prior to adoption to require such an overt act. See sections relating to purposes of amendments in Senate Judiciary Committee Report No. 644, dated July 27, 1961, and House Judiciary Committee Report No. 966, dated August 17, 1961, and Conference Report No. 1161, dated September 11, 1961, 87th Congress, 1st Session.)

E. At the time of the issuance of the search warrant, petitioner was about to be arrested for violation of 18 U. S. C., § 1952. The search warrant, warrant of arrest and complaint specifically referred to this section, but at that time the Government was apparently not aware

of what constituted all of the elements of the offense under Section 1952. The certified transcript of the record filed by the Clerk of the Court of Appeals should reveal that an earlier indictment against petitioner was dismissed by the Government upon petitioner's motion and a new indictment on which petitioner was tried was obtained, because the original indictment omitted one of the basic elements of the offense, to-wit, the commission of an overt act after the alleged interstate travel with the requisite intent. The elements of the offense under Section 1952 are threefold: (1) interstate travel, (2) the requisite intent, and (3) overt acts after travel in furtherance of the unlawful activity. The affidavit of the F. B. I. Agent alleged the travel in interstate commerce but there was absolutely no allegation of the commission of an overt act after the travel. Thus, the affidavit was deficient because it failed to include all of the essential elements of the offense.

F. Because of the failure to allege any overt acts subsequent to the interstate travel, the affidavit did not allege the commission of a federal crime, as required by **Thomas v. United States**, 5 Cir., 376 F. 2d 564. When the majority opinion referred to "probable cause to believe the law was being violated" and to "a sufficiently clear picture of a probable violation of the law", it could only refer to a state law violation, if any. There was no description of the elements of an offense against the laws of the United States. For the 8th Circuit Court of Appeals to sustain the affidavit here puts it in apparent conflict with the 5th Circuit decision in the Thomas case, and this conflict should be resolved by this Court.

* * * * *

Because of the conflict with decisions of the Supreme Court and other Courts of Appeals (and indeed the conflict which obviously exists in the Court of Appeals for

the Eighth Circuit*), and because of the importance of delineating the facts and corroboration which necessarily must be included in an affidavit to give constitutional basis to a search warrant, we respectfully submit that certiorari should be granted as to Question II.

III.

Whether an officer, armed with a search warrant commanding him to search premises forthwith, may, after arriving at the premises to be searched, delay its execution for a period of time, without explanation as to the reason for such delay and, if the officer may delay, whether the officer must satisfactorily explain the reason for such delay or whether the person challenging the search must prove prejudice resulting from the delay.

Rule 41 (c) of the Federal Rules of Criminal Procedure provides that the search warrant "shall command the officer to search forthwith the person or place named for the property specified." The search warrant in this case directed the officer: "You are hereby commanded to search forthwith the place named for the property specified . . .".

The evidence at the hearing on the motion to suppress showed that the officers arrived at the apartment building at approximately 4:55 P. M., concealed themselves in an apartment across the hall, and waited until 7:05 P. M. when the defendant emerged from Apartment F (M. 13-14, 16-17). When asked the reason for waiting two hours and ten minutes, Agent Bender stated: "Well, we wanted

* We believe that the cogent arguments and numerous authorities cited by Judge Heaney in his dissenting opinion are so well presented that they should be fully repeated to show the significance of this case and the necessity for determination of this search question by the Supreme Court. We will not further lengthen this portion of the petition except to commend the reader to the opinion of Judge Heaney.

to observe Mr. Spinelli come out of Apartment F, the apartment in question, and consequently this was the only spot that we could utilize under the circumstances, and we did utilize the apartment, and we did see Mr. Spinelli come out of Apartment F" (M. 17). He further acknowledged that no effort was made to enter the premises either by force or invitation (M. 18).

The only federal case touching this subject is **Mitchell v. United States**, D. C. Ct. App., 258 F. 2d 435, in which it was held that a search warrant issued five days prior to execution was valid. However, as pointed out in the majority opinion herein, the Mitchell case does not "invest the police officers with the discretion to execute the warrant at any time within ten days believed by them to be the most advantageous." But the majority opinion then proceeds to differ with the views expressed by Judge Bazelon in his concurring opinion in the Mitchell case. After reviewing a number of state cases, Judge Bazelon concludes that the officer has no discretion to withhold the execution of the search warrant in order to wait for the best time to serve it, and that the warrant must be served as soon as possible after it has been issued. By holding that the officer may wait a period of two hours and ten minutes before the execution of the search warrant, without any explanation as to his reasons for doing so, the majority opinion is thus in conflict with Judge Bazelon's opinion.

The majority opinion further requires the person challenging the search to maintain the burden of proving that he was prejudiced by the delay in executing the search warrant. No authority is cited for this proposition, and if there is none, then this is an important question of federal law which should be settled by this Court. To place the burden of proof on the petitioner is an unreasonable and probably impossible requirement and would open the way for unbridled abuse by the officers

of the constitutionally controlled area of searches and seizures.

We believe that the law does not, nor should it, require the defendant to prove prejudice resulting from the unexplained delay. This would be an unreasonable burden not required by Rule 41 (e) of the Federal Rules of Criminal Procedure. In the related area where the issue is one of probable cause, this Court has never required that prejudice be shown—only that the defendant have standing to contest the search. **Jones v. United States**, 362 U. S. 257. The burden of proving prejudice is not thrust upon the person objecting to the search where officers have improperly broken doors without giving the required notice of their authority and purpose. **Miller v. United States**, 357 U. S. 301; **Wong Sun v. United States**, 371 U. S. 471. Why should proof of prejudice be required where the officers enter belatedly and not where they enter prematurely?

An unreasonable search, whether because of the absence of probable cause or because of improprieties in the method of execution, is an important constitutional question. Where a violation of constitutional magnitude occurs, we suggest that it is conclusively prejudicial. See **Davis v. United States**, 8 Cir., 247 F. 394, 398, and **Honig v. United States**, 8 Cir., 208 F. 2d 916, 921. At the very least, the burden should be upon the Government to prove beyond a reasonable doubt that the error was harmless. **Chapman v. California**, 386 U. S. 18, 24.

This Court should determine whether a law officer has uncontrollable authority to delay the execution of a search warrant. This is an important Fourth Amendment question which should be decided, lest law enforcement officers further abuse the role of the search warrant. If the decision hinges on whether or not there is prejudice, then we submit that this Court should impose that burden on the Government rather than the defendant.

For the reason that this is a matter which, if uncontrolled, will lead to constitutional abuses in the methods of executing search warrants, a decision on this issue of first impression is necessary, and we respectfully submit that certiorari should be granted as to Question III.

IV.

Whether the term "bookmaking paraphernalia" in a search warrant is sufficiently specific and particular to justify the seizure of an adding machine, pencil sharpener, blank bank deposit slips, radio, currency, glasses, watch, paper, pens, pencils, apartment lease, and telephones.

Rule 41 (c) of the Federal Rules of Criminal Procedure states that the search warrant "shall command the officer to search . . . for the property specified." The Fourth Amendment, as to search warrants, uses the language: "particularly describing the . . . things to be seized."

The property specified in the search warrant was "bookmaking paraphernalia, scratch sheets, bet tabs, pay and collection sheets, bookmaking records, baseball schedules, books and records of bets received, accounts, bookmaker's ledger sheets, two telephones." Among the items seized, according to the inventory made by the searching officers, were the following: Underwood Adding Machine in brown case, pencil sharpener, stack of blank deposit tickets on State Bank of Wellston, G. E. A. M.-F. M. radio, \$22.00 in currency, a pair of glasses, Timex watch, pads of graph paper, four pens, two pencils, lease of premises, and five telephones.

The majority opinion of the Court of Appeals justifies the seizure of these items as being within the general category of "bookmaking paraphernalia." We submit that such a ruling gives an unnecessarily broad definition to the term "bookmaking paraphernalia," contrary to

the command of Rule 41 (c) and the Fourth Amendment. In effect, it would give unlimited authority to the searching officers to seize anything they desired under a general warrant. See **Marron v. United States**, 275 U. S. 192, and **Stanford v. Texas**, 379 U. S. 476. If "bookmaking paraphernalia" can be so broadly construed, then there would be no necessity to specify the other items particularized in the search warrant. Is it not anomalous to describe two telephones in the search warrant and, when the officers seize five, to hold that the additional three are not telephones but "bookmaking paraphernalia."

Because the term "bookmaking paraphernalia" has not been construed by this Court, and because of the unreasonably broad definition given to it by the Court of Appeals, and because of the limitless authority which searching officers in the future may assert as a result of such a general warrant, we believe that this is an important question of federal constitutional law which should be settled by this Court, and we respectfully submit that certiorari should be granted as to Question IV.

V.

Whether one of the purposes of a preliminary examination is to afford an accused an opportunity to hear some of the evidence against him, and whether the Government is entitled to a continuance of the preliminary examination for the obvious reason of presenting the matter to the Grand Jury and thereby avoiding the examination and depriving the accused of the right to hear evidence in advance of trial.

After petitioner's arrest on August 18, 1965, he requested a preliminary examination which was scheduled for September 3, 1965. At that time, over petitioner's objection that the sole purpose of the Government's requested continuance was to delay the examination for

presentation of the matter to the Grand Jury in ex parte secret proceedings and thereby to deprive petitioner of the opportunity to hear witnesses against him, the Commissioner granted the continuance. Prior to the next setting, petitioner was indicted; he never had a preliminary examination.

The majority opinion of the Court of Appeals suggests that the preliminary examination provided by Rule 5 (c) of the Federal Rules of Criminal Procedure is not a discovery proceeding, and that an accused has no absolute right to its discovery benefits. In this respect there is conflict with the view of the Court of Appeals for the District of Columbia in **Drew v. Beard**, 290 F. 2d 741, and **Ross v. Sirica**, 380 F. 2d 557. In the Ross case, the Court quoted from **Blue v. United States**, D. C. Ct. App., 342 F. 2d 894, 901, and said (l. c. 559):

“... the preliminary hearing is an important right of an accused affording him . . . ‘a chance to learn in advance of trial the foundations of the charge and the evidence that will comprise the government’s case against him.’ . . . Moreover, we have held that the right to a preliminary hearing, if timely asserted, is not forfeited solely by the later return of an indictment.”

We believe that the majority opinion’s reliance on **Jaben v. United States**, 381 U. S. 214, is misplaced. In the Jaben case there was no objection to the continuance of the preliminary examination, and even under the particular statutory provision there involved, the Court intimates that the preliminary examination must be held within a reasonable time. The issue in this case—continuance for purpose of avoidance*—was not involved in the Jaben case.

* If an accused can be denied a preliminary examination, then in the interest of fairness and justice petitioner should have

Without an opportunity to have a preliminary hearing and to hear at least a *prima facie* portion of the Government's evidence, without an opportunity to take depositions except under the very limited provisions of Rule 15 of the Federal Rules of Criminal Procedure, and without an opportunity to even know the identity of the Government witnesses, petitioner was severely handicapped in preparing his defense. This procedure, combined with the vagueness of the indictment in the instant case, made a mockery of the Sixth Amendment to the Constitution of the United States, because petitioner was denied his right "to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." The Constitutional provisions are meaningless and the assistance of counsel is of doubtful value without the means to prepare in advance for trial.

Because of the conflict between the decisions of the Court of Appeals for the Eighth Circuit and the Court of Appeals for the District of Columbia and because of the misapplication of a decision of this Court, we respectfully submit that certiorari should be granted as to Question V.

VI.

Whether the indictment against petitioner was constitutionally deficient in that it:

A. was vague, uncertain, indefinite, ambiguous and duplicitous, and

B. charged a multitude of offenses, and

been given an opportunity to determine the identity of the Government's witnesses and to take their depositions prior to trial. A criminal trial is not a game of chance. A defendant should not be subjected to the surprise of learning for the first time at the trial the nature of the evidence against him.

C. failed to apprise petitioner of the particulars of the offense, and

D. as applied to petitioner, authorized his conviction for an offense outside the spirit and intent of 18 U. S. C., § 1952, and

E. was based upon a statute which is unconstitutional.

A. Rule 7 (c) of the Federal Rules of Criminal Procedure states that "the indictment shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." This indictment violated this Rule because it charged a multitude of sins and was vague, uncertain, indefinite, ambiguous and duplicitous. It charged offenses between August 6th and August 18th, 1965. By copying the language of 18 U. S. C., § 1952, it charged the defendant with a multiplicity of offenses in intending "to promote, manage, establish, carry on, and facilitate the promotion, management, establishment and carrying on of an unlawful activity . . ." There was no specification of this unlawful activity except a vague reference to a business enterprise involving gambling, with a citation of a Missouri Statute which also prohibits a variety of offenses. The allegation of overt acts repeated the vagueness of § 1952.

This was no more than a "bare-bones" indictment in statutory language. There were no specific acts charged in the indictment, as was done in **Marshall v. United States**, 9 Cir., 355 F. 2d 999. For all that the indictment stated, petitioner might just as well have been handed a copy of § 1952 and told to prepare his defense. We submit that the Sixth Amendment requires more.

B. The statute under which petitioner was indicted, 18 U. S. C., § 1952, prohibits a multitude of sins. The indictment went even further by charging commission of

offenses, in the vague statutory language, over a period of thirteen days. Thus, petitioner was charged with a multitude of offenses, but the trial court refused to require the Government to elect the offense on which petitioner was to be tried. (See Appendix E.)

The Court of Appeals held that there was no abuse of discretion in denying the motion to require the Government to elect, although conceding that these were "broadly worded charges." When the multiplicity of charges is coupled with the denial of information to petitioner resulting from the refusal of a preliminary examination and the limitations of information granted on the sustaining of petitioner's motion for bill of particulars, we believe that the ultimate effect was prejudicial to petitioner because he had no way of knowing the precise charge which he was required to defend. The various combinations of possibilities under the indictment, spread over a 13-day period, resulted in a multitude of alleged offenses. The impossibility of defending deprived petitioner of his rights to be informed of the nature and cause of the accusation, guaranteed by the Sixth Amendment, and due process of law, guaranteed by the Fifth Amendment.

C. Because of the multiplicity of charges, petitioner filed a motion for bill of particulars seeking exact dates, locations, details of operation and a determination of whether he was charged with promoting, managing, establishing and carrying on or facilitating the promotion, management, establishment and carrying on of an unlawful activity. In addition, petitioner sought other relief in the motion for bill of particulars. After the trial court granted limited relief (Appendix F), which petitioner believes was not sufficient to enable him to prepare his defense, the Government pleaded in the bill of particulars matters beyond the scope of the indictment. In particular,

the Government pleaded dates of alleged operation of a handbook prior to the dates specified in the indictment and pleaded two locations, one of which related to the earlier dates. On a subsequent motion by petitioner, these earlier dates and the location at 9745 Pauline Place were ordered stricken by the Court. (See Appendix G.)

The information contained in the bill of particulars was not sufficient to fully apprise petitioner of the nature of the charges against him, especially as they developed at the trial, and thus he was deprived of his constitutional rights. Furthermore, the permission to the Government to introduce at the trial those matters which had been ordered stricken in the bill of particulars confronted petitioner with a surprising set of facts about which he not only had had no opportunity to prepare a defense but was actually misled into believing that there would be no issue over these earlier dates or the earlier place.

The majority opinion of the Court of Appeals approves the denial of the information requested by petitioner and the subsequent admission of the very evidence which had been ordered stricken from the bill of particulars. The opinion justifies the denial of information on the ground that to furnish it would have frozen the Government's evidence in advance of trial. This Court ought not to permit a rule of law which places a defendant in the position of an interested spectator at the trial, hearing for the first time what the Government's evidence is against him. A defendant should be informed in advance of the basics of the Government's evidence so that he might prepare his defense to this evidence. Keeping secret the identity of the Government witnesses further increases the hazard. As previously suggested, a criminal trial is not a game of chance. If a defendant is to be adequately represented, he should have the information in advance of trial with which to be able to undertake his defense.

D. The legislative history of 18 U. S. C., § 1952, including the testimony of the Attorney General in support of the Bill, indicates that its intent was to affect organized crime, not the sporadic involvement of one individual. See Report No. 644, dated July 27, 1961, of the Senate Judiciary Committee, and Report No. 966, dated August 17, 1961, of the House Judiciary Committee, 87th Congress, 1st Session. The evidence in this case did not show a business enterprise involving a number of individuals; at the most it was a sporadic operation by one person. It was the sort of operation, if it existed, which could easily have been left to local authorities to control.

All of the reported decisions under Section 1952 relating to gambling enterprises involve numerous defendants and participants. Research has revealed no gambling case in which a single individual was prosecuted under the statute for his activities alone. All of the cases involved multiple defendants or factual situations where individual defendants were working back and forth across state lines, transporting other persons or causing other persons to cross state lines for the purpose of maintaining a business enterprise. The instant case does not fall into that category, and the Government's evidence failed to show a "business enterprise" within the spirit and intent of Section 1952.

E. We believe that 18 U. S. C. § 1952 is unconstitutional because it violates:

- (1) the First Amendment's right peaceably to assemble,
- (2) the First Amendment's right of freedom of speech,
- (3) the Fifth Amendment's prohibition against double jeopardy,
- (4) the Fifth Amendment's guarantee of due process in the vagueness, indefiniteness and voidness for want of certainty as to standards of conduct,

(5) the Fifth Amendment's guarantee of due process in the denial of equal protection of the laws arising out of the differences in laws of various states,

(6) the Sixth Amendment's right to trial in the state and district wherein the alleged crime shall have been committed, and

(7) the Tenth Amendment's reservation of powers to the states pertaining to matters exclusively within the jurisdiction of the states and not the federal government.

There have been several dozen reported decisions construing Section 1952 but none by this Court. Because of the growing number of prosecutions under this relatively recent statute and the serious constitutional as well as procedural and evidentiary problems which have arisen, we believe that a determination of the constitutionality of Section 1952 ought to be made by this Court. The application of the statute to petitioner in this case has created important questions of federal law which have not been, but should be, settled by this Court. We respectfully submit that certiorari should be granted as to Question VI.

VII.

Whether statements made by petitioner, after his arrest, employment of counsel and appearance before the Commissioner, and required of him as a condition precedent to return of his personal belongings and to his release on bail, were constitutionally inadmissible under *Massiah v. United States* and related cases.

After petitioner had been arrested and brought before the Commissioner and after he had hired an attorney, he went to the arresting F. B. I. Agent to obtain certain keys which had been seized from him at the time of his arrest. Before giving him the keys, the Agent asked him to identify them. Petitioner indicated that one of the

keys was to his place of residence across the state line. The F. B. I. Agent was permitted to testify to this conversation over petitioner's objection (Tr. 148-150). The Government also called a Deputy United States Marshal who testified, over petitioner's objection, that at the time of his release on bail, petitioner gave an address in Illinois. (Tr. 233-236). On cross-examination the Deputy Marshal acknowledged that petitioner would not have been released on bail without giving an address (Tr. 237).

The majority opinion of the Court of Appeals found that petitioner's Fifth Amendment privilege against self-incrimination was not violated. Recognizing that petitioner would not have been released on bail without giving the information to the Deputy Marshal and acknowledging that petitioner "was faced with a difficult choice", the Court stated that it was a choice that he had to make. Assuming, without conceding, that address information is an absolute necessity for release on bail, this should not necessarily render such information admissible in evidence.

The statements required of petitioner were involuntary and forced from him, contrary to the doctrine of **Massiah v. United States**, 377 U. S. 201. See also **Albertson v. SACB**, 382 U. S. 70, and **Beatty v. United States**, per curiam reversal by this Court on October 23, 1967 in No. 338, on the authority of the Massiah case, of decision of the Fifth Circuit reported at 377 F. 2d 181.*

The majority opinion would force petitioner to make a choice between self-incrimination and the denial of bail—a choice "between the rock and the whirlpool". See **Garity v. New Jersey**, 385 U. S. 493, where incriminating

* The issue involved in this Question is in some respects analogous, although factually stronger, than that presented in three cases argued before this Court on October 10-11, 1967: **Marchetti v. United States**, No. 2; **Grosso v. United States**, No. 12, and **Haynes v. United States**, No. 236.

statements made by a police officer under threat of loss of his job were held to be inadmissible. Furthermore, the denial of bail and refusal to return property would be penalties imposed for exercising a constitutional privilege, contrary to **Griffin v. California**, 380 U. S. 609, and **Spevack v. Klein**, 385 U. S. 511.

For the reason that the decision of the Court of Appeals is in conflict with the foregoing applicable decisions of this Court, we respectfully submit that certiorari should be granted as to Question VII.

VII.

Whether the admission of testimony of an alleged expert witness, including his expression of opinions that a handbook was being operated, bets were being received, a line was being disseminated, and other information was being furnished, constituted an invasion of the province of the jury and deprived petitioner of a trial free from inadmissible evidence.

The Government called a Special Agent of the Federal Bureau of Investigation and attempted to qualify him as an expert witness to testify as to the operation of a handbook. After identifying exhibits, he expressed numerous opinions to the effect that "these are gambling paraphernalia of the type commonly associated with handbook operations" (Tr. 200), that they meant wagers were made (Tr. 201-203); that some of the documents were an account of the handbook (Tr. 204), that there was gambling activity on certain days (Tr. 213-214), and that the evidence he examined in connection with this case indicated "that there were both baseball and horse bets being taken" (Tr. 217).

The majority opinion of the Court of Appeals indicates that because gambling is a complex business, "a properly qualified expert may offer his opinion on relevant matters concerning the operation of a gambling enterprise." As-

suming, without conceding, that the witness was a properly qualified expert, we believe that the decision of the Court of Appeals is in conflict with the decision of the Second Circuit in **United States v. Sette**, 334 F. 2d 267, in which a conviction was reversed because the experts were permitted to express opinions. There is a distinction between the permissible identification of documents, as in **United States v. Angelini**, 7 Cir., 346 F. 2d 278, and the impermissible expression of opinions, as in the Sette case. The Eighth Circuit here failed to recognize the distinction.

The number of federal prosecutions and the area of involvement of the federal government in gambling matters is constantly increasing. Because of the conflict between the decision of this Court of Appeals and those of the Second and Seventh Circuits as to the use of expert witnesses in gambling cases, we respectfully submit that certiorari should be granted as to Question VIII.

IX.

Whether the admission of testimony concerning another handbook operation in another part of the City seven months prior to that charged, without evidence connecting the two alleged operations, deprived petitioner of a trial free from inadmissible evidence.

The indictment herein charged petitioner with interstate travel between August 6 and August 18, 1965, and performance of acts thereafter in a gambling enterprise. The Government, in its original bill of particulars, stated that petitioner had engaged in a handbook operation at 9745 Pauline Place in November and December, 1964, and January, 1965. On petitioner's motion, this information was stricken. (See Appendix G.) At that point, of course, petitioner was under the impression that no evidence pertaining to the alleged operation on Pauline Place would be admitted.

But during the course of the trial, the Court permitted the Government to introduce considerable evidence as to the alleged operation on Pauline Place, on the theory that it showed petitioner's intent and the operation of a business enterprise. The Court of Appeals justifies the admission of this evidence on the ground that petitioner's prior gambling activity conducted elsewhere tended to "prove the lack of innocent purpose in his present venture," although there was no proof of petitioner's participation in any present venture. The Court of Appeals also states that the evidence tended to prove that petitioner was "involved in a continuing 'business enterprise' rather than a single incident of gambling," but there was no evidence of petitioner's involvement in the later activity nor of any connection or continuity between the two activities.

Finally, the Court of Appeals holds that remoteness goes to weight rather than admissibility of the evidence, and that admission is discretionary with the trial court. In so ruling, we believe the Court is in error and in conflict with other Courts of Appeals.

In *Lloyd v. United States*, 5 Cir., 226 F. 2d 9, the Court stated (l. c. 18):

"Evidence of other wrongful acts to prove intent must go further than showing that the defendant has a generally criminal disposition of character, and must logically tend to prove the defendant's criminal intent at the time of the commission of the act charged."

The evil in admitting such evidence was pointed out in *Drew v. United States*, D. C. Ct. App., 334 F. 2d 85, 89-90:

"It is a principle of long standing in our law that evidence of one crime is inadmissible to prove dis-

position to commit crime, from which the jury may infer that the defendant committed the crime charged. Since the likelihood that juries will make such an improper inference is high, courts presume prejudice and exclude evidence of other crimes unless that evidence can be admitted for some substantial legitimate purpose.”

As to the issue of intent, see **Boyer v. United States**, D. C. Ct. App., 132 F. 2d 12, where the Court stated (l. c. 13):

“But the fact that intent is in issue is not enough to let in evidence of similar acts, unless they are ‘so connected with the offense charged in point of time and circumstances as to throw light upon the intent.’”

The evidence in this case was too remote in time and place. We submit that seven months of inactivity intervening between the two geographically disconnected operations was not similar to the reasonable time found in **United States v. Compton**, 6 Cir., 355 F. 2d 872, a case arising under 18 U. S. C., § 1952, where the Court said (l. c. 874):

“The law is settled that evidence of a substantial course of illegal conduct, occurring a reasonable time before and after an act of interstate travel, will allow a jury to infer that the travel was undertaken with the intent to carry on the unlawful activity.” (Emphasis supplied.)

Because of this conflict with decisions of other circuits pertaining to the admissibility of evidence of other offenses, we respectfully submit that certiorari should be granted as to Question IX.

X.

Whether, in a jury instruction pertaining to the violation of Missouri law, the inclusion of offenses not prohibited or not proved, makes the instruction erroneous.

The Court's instruction (Tr. 294) was as follows:

"The business enterprise involving gambling alleged to have been carried on by the defendant is operating a handbook, that is, accepting wagers on athletic contests and the furnishing of odds and point spreads on athletic contests. If you, the jury, find and believe from the evidence and beyond a reasonable doubt that the defendant did engage in accepting wagers on athletic contests and in furnishing odds or point spreads on athletic contests as a business enterprise, then I instruct you as a matter of law that such activity violates the law of the State of Missouri, as set out in Section 563.360 of the Missouri Revised Statutes of 1959."

A reading of the Missouri statute set forth in Appendix C shows that the instruction expanded the offense covered by the statute. The furnishing of odds or point spreads, characterized by the trial court as part of a handbook operation, is not a violation of Section 563.360, and, in fact, the use of the term "handbook" injected something beyond the scope of the statute. Thus, the jury was permitted to convict on evidence broadening the statute, contrary to the decision of the Supreme Court of Missouri in **State v. Oldham**, Mo. Sup., 98 S. W. 497, which holds that the statute must be strictly construed. Although as stated in **State v. Huber**, Mo. Sup., 263 S. W. 94, the actual recording or registering of a bet was the offense denounced by the statute, there was here no evidence that petitioner had committed any such offense. Even if the evidence of Mr. Miller was admissible and

even if the search was legal, there was no evidence of the acceptance of any bets by petitioner or anyone else during the period covered by the indictment.

The Court of Appeals, in approving the foregoing instruction, interprets Missouri law in conflict with the applicable law as determined by the Supreme Court of Missouri. For this reason, we respectfully submit that certiorari should be granted as to Question X.

XI.

Whether lack of positive evidence of essential elements of the offense charged against petitioner, his intent and the commission of an overt act, except such as may possibly be created by inferences based upon inferences, vitiates petitioner's conviction.

The three basic elements of the crime charged by an indictment under 18 U. S. C., § 1952, are: travel in interstate commerce, guilty intent, and overt acts subsequent to travel with the necessary intent. The opinion of the Court of Appeals finds evidence of intent and overt acts by inference only. We believe the opinion is in error because no proper inferences could be drawn to supply these two essential elements of the offense.

On the issue of intent, the opinion permits "the jury to infer that the purpose of the trip was motivated by the gambling operation." Inasmuch as there was no direct proof of any gambling operation during the period alleged in the indictment, such a gambling operation could only be established by an inference based upon the evidence of prior operations on Pauline Place and the opinions of Dr. Miller, assuming such evidence was properly admitted. To infer the necessary intent necessitates an inference based upon an inference, which is improper under *Ingram v. United States*, 360 U. S. 672, 680.

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Similarly with reference to the overt act, the opinion permits an improper inference based upon inferences. The Court of Appeals requires that "some overt act directed to the illegal gambling activity" be proved, but the record is devoid of any such act after the dates of travel alleged in the indictment. (As previously noted, the overt act must be subsequent to the travel.)

The majority opinion infers proof of an overt act from petitioner's visits to an apartment which was the scene of inferred gambling activity, but there was no evidence of any act by petitioner, except that he was there. At the most, this was an inference based upon an inference. The statement that petitioner had a key to the apartment overlooks the fact that another person also had a key (Tr. 184), and the inference could be just as easily drawn that the other person operated the inferred handbook. The opinion also infers proof of an overt act from the fact that petitioner was in the room alone with the gambling paraphernalia, and yet there was no proof from the Government's handwriting expert nor anyone else that petitioner did anything while he was in the room (Tr. 221). There is nothing in the record to prove or even infer the necessary overt act.

Although factual comparisons with other cases are not entirely satisfactory, the evidence found here by the Eighth Circuit to be sufficient was not as strong as that which was held insufficient by the Fourth Circuit in **United States v. Honeycutt**, 311 F. 2d 660, where there was actual evidence that defendant had sold some gambling equipment.

In **United States v. Hawthorne**, 4 Cir., 356 F. 2d 740, the Government was held to strict proof of the purpose of the interstate trip and the proof was not sufficient to show an unlawful purpose. There the Court stated (l. c. 742):

"It is not the intent of the statute to make it a crime per se for one who operates a gambling establishment to travel interstate. To so hold might raise serious questions of the constitutionality of the Act (cases cited). . . . In the instant case, however, the essential element of the crime is the interstate travel of the offender himself. We do not rest our decision on the fact that the first proven overt act of gambling did not occur until nearly five months after the trip in question. Other trips Hawthorne took prior to that charged in count one of the indictment were directly related to his enterprise, but the connection with this specific trip is too tenuous."

Specific proof of an overt act related to a specific act of interstate travel is required. Even the Government's evidence in the instant case as to the meaning of documents found after the search related to sporting events taking place on dates with which petitioner was not charged with traveling in interstate commerce (Tr. 213).

The instant case might have created some suspicion as to the defendant's activities, but suspicion is not sufficient to convict. In a narcotics case in which there was substantially more suspicion than in the present case, **Ong Way Jong v. United States**, 9 Cir., 245 F. 2d 392, the court used language which would be particularly applicable to petitioner (l. c. 394):

"No evidence has been adduced which definitely proves that (the defendant) was here engaged in any criminal activity. No one has directly testified to such a connection or any circumstances from which such an accessoryship could be legally inferred. Guilt by association would be the only basis."

Suspicion, speculation, surmise and inference are not sufficient to sustain a conviction. **United States v. Barnes**, 9 Cir., . . . F. 2d . . . , No. 17,181, decided October 7, 1967.

Because of the approval by the Eighth Circuit of a conviction without evidence, which we believe is a departure from the basic constitutional requirement that there must be evidence of guilty conduct before there can be a finding of guilt, and because of the apparent conflict with cases of the Fourth and Ninth Circuits involving the evidence necessary to convict under the same statute, we respectfully submit that certiorari should be granted as to Question XI.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

**United States Court of Appeals
For the Eighth Circuit.**

No. 18,389.

William Spinelli,

Appellant,

v.

United States of America,

Appellee.

Appeal from the
United States Dis-
trict Court for the
Eastern District of
Missouri.

[February 1, 1967.]

Before Van Oosterhout, Gibson, and Heaney, Circuit
Judges.

Heaney, Circuit Judge.

Appellant William Spinelli was indicted on September 15, 1965, for traveling in interstate commerce with intent to carry on a business enterprise involving unlawful activity, to wit: gambling, contrary to 18 U. S. C., § 1952. This indictment was dismissed pursuant to Rule 48 (a) of the Federal Rules of Criminal Procedure on November 19, 1965,¹ a second indictment having been obtained on November 18, 1965.

¹ The original indictment was dismissed at the Government's request on November 18, 1965. Prior to the dismissal, appellant had filed a motion to dismiss upon the ground the indictment failed to allege any overt acts subsequent to travel.

Appellant was convicted under the second indictment, which alleged that he had traveled in interstate commerce with intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment and carrying on of an unlawful activity, to wit: a business enterprise involving gambling in violation of Missouri Revised Statutes, 1959, Section 563.360; and did thereafter perform and attempt to perform acts to promote, manage, establish, carry on, and facilitate the promotion, management, establishment and carrying on of said unlawful activity, in violation of Title 18 U. S. C. § 1952. He appeals from this conviction urging numerous errors at law. We shall consider those which are dispositive: (1) Did the trial court err in ruling on the defendant's motion to suppress evidence on the grounds that he lacked standing to protest the search? (2) Was probable cause shown to the commissioner to justify his issuance of the search warrant?

We shall consider the "standing" issue first.

It is clear from the record, and counsel for respondent concedes, that the evidence obtained through the search based on the search warrant was essential to the conviction.²

The affidavit in support of the search warrant was made before a United States Commissioner and signed by a Special Agent of the Federal Bureau of Investigation on August 18, 1965. It related that the affiant or other Agents of the Bureau observed the appellant driving a 1964 Ford

² The evidence seized during the search included: betting markers, a baseball line, bet tabs, \$22.00 in currency, tally sheets, adding machine, a two-band radio, copies of "Baseball Scoreboard," pencils and pens, and two telephones. Special Agent Miller, while testifying at the trial, interpreted the various exhibits as gambling paraphernalia of the type commonly associated with a handbook operation. The interpretation by Miller is the only direct connection between appellant and a gambling operation.

onto the eastern approaches of Eads or Veterans Bridge leading from East St. Louis, Illinois, to St. Louis, Missouri, on four occasions in 1965: August 6, 11:44 a. m.; August 11, 11:16 a. m.; August 12, 12:07 a. m.; August 13, 11:08 a. m.; and driving off the western end of the Eads Bridge to St. Louis, Missouri, at 11:18 a. m.; on August 11 and at 11:11 a. m., on August 13.

It further related that the appellant had been observed by federal agents driving the car into a parking area used by residents of the Chieftain Manor Apartments on August 11, 4:40 p. m.; August 12, 3:46 p. m.; August 13, 3:45 p. m.; and August 16, 3:22 p. m. He was also seen entering the front entrance of one of the Chieftain Manor Apartments, 1108 Indian Circle Drive, on August 12, at 3:49 p. m.; walking toward the same apartment building after parking his car on August 16; entering the apartment building on August 16; and entering the southwestern corner apartment (F) on the second floor at 1108 Indian Circle Drive, on August 13, 1965, at 3:55 p. m.

The affidavit went on to state:

"The records of the Southwestern Bell Telephone Company reflect that there are two telephones . . . (in Apartment F) under the name of Grace P. Hagen. . . . The numbers . . . are WYdown 4-0029 and WYdown 4-0136.

"William Spinelli is known to this affiant and to federal law enforcement agents and local law enforcement agents as a bookmaker, an associate of bookmakers, a gambler, and an associate of gamblers.

"The Federal Bureau of Investigation has been informed by a confidential reliable informant that William Spinelli is operating a handbook and accepting wagers and disseminating wagering information by means of the telephones which have been assigned the numbers WYdown 4-0029 and WYdown 4-0136."

The United States Commissioner issued the search warrant without taking any oral testimony.

Armed with the warrant, the federal agents went directly to the apartment building at 1108 Indian Circle Drive and stationed themselves in an apartment across the hall from Apartment F. After a two-hour-and-ten-minute wait, the appellant emerged from Apartment F into the hall and was immediately served with a warrant for his arrest. He was also served with a warrant to search the apartment. A key found on his person was used to open the apartment door. A number of the agents searched the premises, while others took the appellant to police headquarters. During the search, another man entered the apartment with a key but was not arrested.

A motion to suppress the evidence obtained through the search was overruled by the District Court on the grounds that the appellant had failed to allege or show that he was legitimately upon the premises searched; and, therefore, lacked standing, citing *Jones v. United States*, 362 U. S. 257 (1960).

We feel the trial court misconstrued *Jones* and that defendant had standing. In *Jones* the defendant was charged with violating federal narcotics statutes [21 U. S. C., § 174 and 26 U. S. C., § 4704 (a)] which permit conviction upon proof of possession of narcotics. The Supreme Court overruled the trial court and the United States Court of Appeals for the District of Columbia, holding that the defendant, a guest in an apartment at the time it was searched, had standing under Rule 41 (e) of the Federal Rules of Criminal Procedure to question the validity of a search in which the narcotics were seized on either of two bases:

1. Where possession both confers standing and convicts, it is not necessary for a preliminary showing of an in-

terest in the premises searched or the property seized to be made when standing is challenged;

2. Where the defendant is legitimately present on the premises at the time of the search and where its fruits are proposed to be used against him, he has standing.

The affidavit for the search warrant and testimony taken at the hearing on the appellant's motion to suppress show that he was legitimately on the premises. He was observed entering Apartment F alone on August 13; he was alone in the apartment for at least two hours on the day that the search warrant was served, August 18; he had a key on his person on that date which was taken from him by the agents and used to open the door to Apartment F; he was observed entering the apartment building on two other occasions, August 12 and 16; it may be inferred from the affidavit that he also went to Apartment F on the 12th and 16th, and perhaps on other occasions.

It is clear that the Government intended to use the fruits of the search against appellant. Applying *Jones* to this fact situation, the appellant had standing to make a motion to suppress the evidence obtained through the search.

The Government's argument that the appellant is not entitled to standing because he was arrested and served with a search warrant in the hall immediately outside the apartment is without merit. The fact that he was in the act of voluntarily leaving the apartment when served does not weaken his right to be on the premises. If we were to adopt the Government's point of view on this issue, the appellant's argument that the agents were obligated to serve the search warrant immediately on their arrival would have to be considered. A basic constitutional right cannot be defeated by the expedient of withholding the service of the warrant until the moment one is in the act of leaving the premises to be searched.

The Second Circuit in *United States v. Miguel*, 340 F. 2d 812, 814 (2d Cir. 1965), in holding that the lobby of a multi-tenant apartment was not within the protection of appellant's dwelling, stated:

"Miguel did not own the apartment on the sixteenth floor. The tenant was Miss Almerio Lewis, who allowed appellant to stay there from time to time and keep clothes there. This gave him standing under Rule 41 (e) Fed. Rules of Cr. Proc. to object to a search of the apartment of Miss Lewis. *Jones v. United States*, 362 U. S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697. No search of her apartment was made until September 24."

The appellant's timely motion to suppress the evidence raised the issue of standing. He was not required to allege his specific interest in the property, i. e., lessee, business invitee, guests, etc., nor was he required to take the stand to establish his interest. His interest was established by the allegations in the indictment, the statements in the affidavit in support of the search warrant, and the testimony developed under cross examination at the hearing to suppress. We conclude, therefore, that the trial court erred in denying the appellant standing and hold that the evidence before the trial court established that appellant had a sufficient interest in the premises to be a "person aggrieved" by the search.³

We now consider the grounds upon which the search is alleged to have been illegal.

The only information before the commissioner when he issued the warrant was that set forth in the affidavit. Its

³ Probable cause is a requirement of both the Fourth Amendment to the Constitution and Rule 4 of the Rules of Criminal Procedure, which the Rule implements. *Aguilar v. Texas*, supra; *Nathanson v. United States*, 290 U. S. 41 (1933); *Giordenello v. United States*, 357 U. S. 480 (1958).

sufficiency, therefore, must be determined from its face. See *Giordenello v. United States*, 357 U. S. 480, 486 (1958); *Aguilar v. Texas*, 378 U. S. 108 (1964). In determining whether probable cause exists,⁴ the Court must not take a grudging or negative attitude toward the warrant which will tend to discourage police officers from submitting information to a judicial officer before acting, but must insist that the commissioner perform his duties neutrally and not serve as a rubber stamp for the police. *Aguilar v. Texas*, *Id.* at 111; *United States v. Ventresca*, 380 U. S. 102, 109 (1965).

Justice Goldberg, speaking for a divided court in *United States v. Ventresca*, *Id.* at 108, stated that hearsay may serve as the basis for the issuance of a warrant as long as there is a substantial basis for the hearsay and the magistrate is informed of some of the underlying circumstances supporting the affiant's conclusions and his belief that the informant was credible or his information reliable.

"This is not to say that probable cause can be made out of affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists without detailing any of the underlying

⁴ In the light of this holding, it is not necessary for us to consider whether *Jones* should be extended to cases where possession of the premises is a vital but not the sole element of the crime charged. Nor is it necessary for us to reach the question as to whether appellant's rights under the Fifth Amendment may have been violated in view of our holding that the warrant does not show probable cause. See *Jones v. United States*, at 262, where Justice Frankfurter stated: "At the least, such a defendant has been placed in the criminally tendentious position of explaining his possession of the premises. He has been faced, not only with the chance that the allegations made on the motion to suppress may be used against him at the trial, although that they may be by no means an inevitable holding, but also with the encouragement that he perjure himself if he seeks to establish 'standing' while maintaining a defense to the charge of possession." See *Safarik v. United States*, 63 F. 2d 369 (8th Cir. 1933); Wash. U. L. Q. 480, 490, 496-99 (1965).

circumstances' upon which that belief is based. See *Aguilar v. Texas*, supra. Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police. However, where these circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants."

See *Draper v. United States*, 358 U. S. 307 (1959).

The only statement in the affidavit that directly links the defendant with unlawful activity in Apartment F is set forth in the final paragraph:

"The Federal Bureau of Investigation has been informed by a confidential reliable informant that William Spinelli is operating a handbook and accepting wagers and disseminating wagering information by means of the telephones which have been assigned the numbers WYdown 4-0029 and WYdown 4-0136."

The statements made in this paragraph are not based on affiant's personal knowledge, nor is it shown that they are based on the unidentified informer's personal knowledge. The basis of the informant's credibility or reliability is not shown, and the time when the affiant received the information from his anonymous informant is not fixed. The statements are conclusory in nature and do not provide the commissioner with a basis on which to make an independent determination of probable cause. Following

the decisions in *Riggan v. Virginia*, 384 U. S. 152 (1966); *Ventresca*, *supra*; *Aguilar*, *supra*; *Gillespie v. United States*, No. 18071 (8th Cir. 1966); and *Rosencranz v. United States*, 356 F. 2d 310 (1st Cir. 1966), we would be required, if this statement stood alone, to hold that the search warrant should not have been issued and that the appellant's motion to suppress the evidence gathered should have been granted.

In *Aguilar*, *supra*, at 113-114, in discussing an almost identical allegation, the Court stated:

"The vice in the present affidavit is at least as great as in *Nathanson* and *Giordenello*. Here the 'mere conclusion' that petitioner possessed narcotics was not even that of the affiant himself; it was that of an unidentified informant. The affidavit here not only 'contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein,' it does not even contain an 'affirmative allegation' that the affiant's unidentified source 'spoke with personal knowledge.' For all that appears, the source here merely suspected, believed or concluded that there were narcotics in petitioner's possession. The magistrate here certainly could not 'judge for himself the persuasiveness of the facts relied on . . . to show probable cause.' He necessarily accepted 'without question' the informant's 'suspicion', 'belief' or 'mere conclusion'.

* * * * *

" . . . the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see *Rugendorf v. United States*, 376 U. S. 528, 11 L. Ed.

2d 887, 84 S. Ct. 825, was 'credible' or his information 'reliable'. Otherwise, 'the inferences from the facts which lead to the complaint' will be drawn not 'by a neutral and detached magistrate,' as the Constitution requires, but instead, 'by a police officer 'engaged in the often competitive enterprise of ferreting out crime,' *Giordenello v. United States*, supra, 357 U. S. at 486, 2 L. Ed. 2d at 1509; *Johnson v. United States*, supra, 333 U. S. at 14, 92 L. Ed. at 440, or, as in this case, by an unidentified informant."

There remains the question, however, of whether the other allegations of the affidavit standing with the conclusionary paragraph were sufficient to justify the commissioner in finding probable cause. We do not believe they do.

The fact that appellant was under surveillance by the Federal Bureau of Investigation would not, in and of itself, give rise to probable cause. *Riggan*, supra.

Interstate travel and the use of an apartment without connecting such travel and use with unlawful activity in the apartment are not sufficient to show probable cause. The conclusionary statement of the unidentified informant that unlawful activity was taking place in the apartment is insufficient for this purpose.

The issuance of a search warrant is to be based on more specific evidence than was provided in the present instance. For example, in *Ventresca*, supra, investigators smelled the odor of fermenting mash in the vicinity of the suspected dwelling, heard the sound of a motor and pump coming from the premises, and observed sugar and some empty and full metal tin cans being carried in or out of the premises. The manner in which the cans were handled and the sounds heard during handling suggested that the cans contained liquid. In *United States v. Gorman*, 208

F. Supp. 747 (E. D. Mich. 1962), several others engaged in handbook activities were seen entering the apartment alone, or with the defendant. In *Biondo v. United States*, 348 F. 2d 272, 273 (8th Cir. 1965), the defendant was observed carrying racing forms into the apartment. In *United States v. Ramirez*, 279 F. 2d 712, 715 (2d Cir. 1960), the affiant personally saw quantities of white powder he believed to be heroin in the apartment to be searched two days before the warrant was issued; and in *United States v. Rugendorf*, 376 U. S. 528 (1964), a reliable informant told the affiant he saw furs, alleged to have been stolen in the defendant's basement a few days before the search.

Maintaining two telephones on the premises does not, in the absence of some specific evidence of how the phones were used, constitute probable cause for the issuance of a search warrant. *United States v. Gebell*, 209 F. Supp. 11 (E. D. Mich. 1962). See *United States v. Menser*, 360 F. 2d 199, 203 (2d Cir. 1966); *United States v. Nicholson*, 303 F. 2d 330 (6th Cir. 1962); and *United States v. Gorman*, supra at 748, where numerous long distance telephone calls with known bookmakers were consummated over the phones in question; and *Biondo v. United States*, supra at 274, where unusual telephonic equipment was in use.

The fact that the appellant was known to the affiant and other law enforcement agents as a bookmaker, and an associate of bookmakers, would, under some circumstances, make the charge against him subject to less skepticism than if he had not had such a history. See, *Jones v. United States*, supra at 708. But here, there is nothing to tie the defendant's alleged illegal activity to the premises.

No specific information is set forth to corroborate the statement of the informer that appellant was operating a handbook, accepting wagers or disseminating wagering information by means of a telephone in Apartment F.

There is no indication from the affidavit that the appellant ever carried bookmaking paraphernalia into the apartment, or that such paraphernalia was ever seen in the apartment by the Federal Bureau of Investigation or any of their informers. See, *United States v. Freeman*, 358 F. 2d 459 (2d Cir. 1966); *United States v. Conti*, 361 F. 2d 153 (2d Cir. 1966); *United States v. Grosso*, 358 F. 2d 154 (3d Cir. 1966). No underlying information is set forth to show that the telephones were used for unlawful activities; there is nothing to show that the telephones were anything other than residential phones; there is no indication that a large number of long distance calls were made, let alone to whom or where they were made.

Considering the affidavit in its entirety as we must, it does not provide the basis for probable cause.

Reversed.

Gibson, Circuit Judge, dissenting.

Respectfully, I must dissent. While I agree with the majority's conclusion that the appellant has standing to object to the search of the room, I do not agree that the warrant authorizing the search of that room was issued without a showing of probable cause.

The sole issue on this dispositive point is whether the information before the Commissioner was legally capable of persuading him, as a man of reasonable caution, that the laws of the United States were being violated and a part of this violation consisted of an illegal act being committed on the described premises. *Brinegar v. United States*, 338 U. S. 160 (1949); *United States v. Gosser*, 339 F. 2d 102 (6th Cir. 1964), cert. denied 382 U. S. 819; *United States v. Eisner*, 297 F. 2d 595 (6 Cir. 1962), cert. denied 369 U. S. 859; *Lowrey v. United States*, 161 F. 2d 30 (8 Cir. 1947), cert. denied 331 U. S. 849. This is but an ap-

plication of the universally accepted definition of the probable cause necessary to issue a search warrant, namely, "reasonable ground for belief of guilt." *Brinegar v. United States*, supra. If the information in the affidavit, in its totality, provided the Commissioner with a substantial basis for believing the law was being violated, his finding should be sufficient. *Rugendorf v. United States*, 376 U. S. 528, 533 (1964); *Jones v. United States*, 362 U. S. 257 (1960).

I think the majority opinion pays too little heed to this basic rule for determining and reviewing "probable cause" and placed, instead, undue reliance upon the case of *Aguilar v. Texas*, 378 U. S. 108 (1964). I feel this reliance is misplaced in that *Aguilar* only provides a caveat to the general "probable cause" principle and is not a replacement of it. *Aguilar* was directed to the specific situation in which a warrant was based solely upon the hearsay conclusion of a third-party informant, and the majority found that without elaboration of underlying circumstances this conclusion could not, as a matter of law, provide a magistrate with the substantial basis necessary for a finding of probable cause. *Aguilar* recognizes that an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, but stresses the need of stating the underlying circumstances for conclusions made by the affiant. Page 114 of 378 U. S. It also recognizes the legal difference to be accorded a magistrate's determination of probable cause by noting:

"Thus, when a search is based upon a magistrate's, rather than a police officer's, determination of probable cause, the reviewing courts will accept evidence of a less 'judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant,' *ibid.* (*Jones v. United States*, 362 U. S. 257) and will sustain the judicial determina-

tion so long as 'there was substantial basis * * *,' for the magistrate's conclusion. Page 111 of 378 U. S.

Although *Aguilar* placed restrictions on the use of hearsay conclusions, I do not read it as attempting to establish any new and guiding principles for the common, but wholly different, situation where there are numerous independent pieces of evidence presented to the magistrate, only one of which is an unsupported hearsay conclusion. *United States v. Plemmons*, 336 F. 2d 731 (6 Cir. 1964). I do not believe that we should be overly influenced by the holding in *Aguilar* and expend all of our energy searching in vain for circumstances underlying the informer's conclusion. Rather, we must look to the broad principles that govern the finding of probable cause. We have before us more than an informer's conclusion. So, we must look to the totality of all the information that was before the Commissioner, and from all of this evidence determine if there was substantial basis for the Commissioner to believe the law was being violated on the described premises. *United States v. Jordan*, 349 F. 2d 107 (6 Cir. 1965); *United States v. Nicholson*, 303 F. 2d 330 (6 Cir. 1962), cert. denied 371 U. S. 823.

In viewing the information we must remind ourselves that the Commissioner's finding is entitled to significant weight, *United States v. Ramirez*, 279 F. 2d 712, 716 (2 Cir. 1960), cert. denied 364 U. S. 850, and in close cases the decisions should tip in favor of the warrant's issuance. *United States v. Ventresca*, 380 U. S. 102 (1965). Probable cause is, of course, more than suspicion, but it does not demand certainty. It does not demand the evidence sufficient to justify conviction. *Locke v. United States*, 7 Cranch. 339 (1813). In fact, less evidence is demanded than would justify an officer in acting without a warrant. *Aguilar*, supra; *Johnson v. United States*, 333 U. S. 10 (1948).

While the informant's hearsay set forth in the present warrant might not, standing alone, if viewed as conclusory rather than factual, justify the issuance of a warrant, this does not mean, however, that this information carries no weight in determining the issue of probable cause. *Aguilar v. Texas* did not, in any way, say that informers' statements or conclusions were worthless as evidence in supporting a warrant. On the contrary, it, along with *United States v. Ventresca, supra*, and *Jones v. United States, supra*, clearly upheld the basic probative worth of hearsay conclusions in warrant applications. Therefore, while not of independent weight sufficient to tip the scales in favor of the issuance of the warrant due to the lack of supporting circumstances, the conclusion of the informant has some very definite probative value. *Miller v. Sigler*, 353 F. 2d 424, 426 (8 Cir. 1965), cert. denied 384 U. S. 927. The statement in the affidavit, that the F. B. I. has been informed "by a confidential, reliable informant that William Spinelli is operating a handbook and accepting wagers and disseminating wagering information by means of the telephones," can be viewed as a statement of fact made by the designated reliable informant, and not merely as a conclusion that the law is being violated. Gambling is not a complicated operation that entails the imprimatur of a legal concept to bring it into being. Rather, it is a simple factual statement embodying wagering for gain. The affidavit states with particularity the type of gambling operation, bookmaking, and states with specificity the property being used in that operation. This is done with simple, direct words that admit of no other meaning. I think we, therefore, should apply a simple, practical test to their sufficiency, without imposing semantic and technical requirements disassociated from the practicalities of everyday life. The word "reliable" connotes credibility and the F. B. I. agent makes this affidavit under oath. Certainly, it should be accorded proper deference. If the magistrate does not believe the affiant, he need

not issue the warrant, as many of the facts are stated to be within the personal knowledge of the affiant. The appellant here has shown no abuse of the search warrant process. If this process is being abused, and I do not think it has been shown to be, such abuses can certainly be corrected without making society the victim of legalistic, technical requirements that are of great benefit to the criminal. Moreover, even if this factual statement be viewed as conclusionary, it, when accompanied and supported by additional evidence, can well serve as a substantial basis upon which a magistrate would be justified in acting. *Draper v. United States*, 358 U. S. 307 (1959); *Rosencrane v. United States*, 356 F. 2d 310 (1 Cir. 1966); *Schoeyeman v. United States*, 317 F. 2d 173, 178 (D. C. Cir. 1963).

The observation of appellant leaving his home in Illinois on a number of occasions and calling at this apartment in Missouri at a particular hour does little to establish illegal activity. However, when this is coupled with the fact that the Commissioner was informed that appellant was known to the affiant and to others as a bookmaker, a gambler, and a consort of book makers and gamblers; and that there were two telephones in this regularly visited apartment, one would justifiably become very suspicious. When all three of these independent facts are coupled with the reliable informer's statement that gambling was taking place on these premises, this suspicion could validly have developed into a reasonable probability, justifying the issuance of a warrant. The additional independent evidence all tended to support, confirm, and corroborate the conclusion of the informer, giving, I believe, a substantial basis for crediting the hearsay. *Jones v. United States*, *supra*; *Draper v. United States*, *supra*; *Rosencrane v. United States*, *supra*.

The majority opinion viewed each piece of information independently and in isolation, and concluded that each

piece lacked the probative weight to justify the warrant. While I admit that each of these individual pieces of information independently and in isolation might not support a constitutional warrant, when placed together they form in my mind a relatively composite picture of appellant conducting gambling activities on the described premises. As a series of seemingly meaningless bits of evidence can combine to form in their totality a web of circumstantial evidence sufficient to justify a jury conviction, so a web of independent facts can form a sufficiently clear picture to allow a magistrate to issue a constitutional warrant. After all, we are trying to ascertain, in any given situation, what the actual truth is. See, *United States v. Menser*, 360 F. 2d 199 (2 Cir. 1966); *United States v. Gorman*, 208 F. Supp. 747 (E. D. Mich. 1962). From looking at the affidavit, I do not believe we can say that the facts are insufficient, as a matter of law, to persuade a man of reasonable caution that illegal activities were taking place. I do not believe we can say, as a matter of law, that the conclusion reached by the Commissioner could not possibly be drawn by a "neutral and detached magistrate." I think the facts and the reasonable inference deducible therefrom in the affidavit were sufficient to cause a man of reasonable prudence to believe that an offense was probably being committed. An offense, as charged, was being committed, which fact, of course, cannot be used to sustain the warrant. However, the indications giving rise to a permissible reasonable belief that an offense was being committed were sufficiently detailed in the affidavit. To my mind, they are legally capable of supporting the judgment of the Commissioner in issuing the warrant. Certainly, an officer should not have to prove beyond a reasonable doubt that a crime has been, or is being, committed, to obtain a search warrant with which to investigate a situation that has the probable appearance of criminal activity. It should not be necessary to conduct a full-

blown, plenary legal hearing to secure a search warrant. The neutral and detached judgment of the Commissioner should be sufficient. This affidavit, while not establishing a certainty of criminal activity, did establish a probability of criminal activity. As outlined in *Brinegar v. United States*, at 175 of 338 U. S.:

"In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved."

Consequently, I believe the warrant should be held valid.

It appears to me that the action of the majority in this case is an extension of the Supreme Court demands and thus places additional technical requirements on our already overburdened law enforcement officers. *Aguilar v. Texas*, of course, on the record only involved an unsupported hearsay conclusion. *Riggan v. Virginia*, 384 U. S. 152 (1966), without opinion, struck down a warrant which curiously recited that the application was based upon, "personal observation of the premises and information from sources believed by the police department to be reliable." *Riggan v. Commonwealth*, 144 S. E. 2d 298, 299 (n. 1) (Va. 1965). Certainly, this information in *Riggan* is far less than the rather detailed recital found in the affidavit before us. In addition, we recently held, in *Gillespie v. United States*, 368 F. 2d 1 (8 Cir. 1966) that orally stating to the magistrate that the suspect had a wagering stamp and that the affiant had "obtained information that indicated he (the suspect) was currently in the gambling business," was insufficient for a warrant to search his

¹ There is nothing to indicate that the information set forth in the dissenting opinion was actually before the issuing magistrate.

residence. While relevant, obviously this case is not controlling.

In summary of these cases, the *Aguilar* affidavit contained only the unadorned conclusion. The *Riggan* affidavit set forth only two evidentiary elements: (1) personal observation, and (2) informant's conclusion. The *Gillespie* information included only: (1) knowledge of suspect's gambling stamp, and (2) informant's conclusion. However, in the case before us there are not two, but four, basic evidentiary elements. They are: (1) informant's statement that gambling was taking place; (2) detailed observation of suspect's visits; (3) personal knowledge of past gambling habits and associations, and (4) two separate telephones in the apartment. To my knowledge, this evidence far exceeds any warrant reviewed and rejected by any court. Indeed, the warrant approved in *United States v. Whiting*, 311 F. 2d 191 (4 Cir. 1962), cert. denied 372 U. S. 935, was based upon facts somewhat similar to the ones herein.

In conclusion, I believe we should heed the cautions announced in the recent opinion of *United States v. Ventresca*, supra, at page 108 of 380 U. S.:

"If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants . . . must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. . . . Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting."

I think this is a definite indication that the Supreme Court is not intending to expand its requirements for the

constitutional issuance of warrants. Yet, I am convinced that the majority's action in this case is a significant expansion of the constitutional minimum expected of warrant applications.

I am, indeed, disturbed by decision after decision of our courts which place increasingly technical burdens upon law enforcement officials. I am disturbed by these decisions that appear to relentlessly chip away at the ever narrowing area of effective police operation. I believe the holdings in *Aguilar*, and *Rugendorf v. United States*, 376 U. S. 528 (1964) are sufficient to protect the privacy of individuals from hastily conceived intrusions, and I do not think the limitations and requirements on the issuance of search warrants should be expanded by setting up over-technical requirements approaching the now discarded pitfalls of common law pleadings. Moreover, if we become increasingly technical and rigid in our demands upon police officers, I fear we make it increasingly easy for criminals to operate, detected but unpunished. I feel the significant movement of the law beyond its present state is unwarranted, unneeded, and dangerous to law enforcement efficiency.

For the reasons set out in this dissent, I would approve the warrant and affirm the conviction, unless one of the other many objections raised by defendant proved to be well taken. Since the other issues raised are not reached in the majority opinion because of the dispositive nature of the holding, it would serve no purpose to review them in this dissent.

A true copy.

Attest:

Clerk; U. S. Court of Appeals, Eighth Circuit.

APPENDIX B.

**United States Court of Appeals
For the Eighth Circuit.**

No. 18,389.

William Spinelli,

v.

United States of America,

Appellee.

Appellant,

Appeal from the
United States Dis-
trict Court, East-
ern District of
Missouri.

[July 31, 1967.]

Before Vogel, Chief Judge, and Van Oosterhout, Matthes,
Blackmun, Mehaffy, Gibson, Lay, and Heaney, Circuit
Judges, sitting en banc.

Gibson, Circuit Judge.

This is an appeal from a judgment of the United States District Court for the Eastern District of Missouri convicting appellant of violating 18 U. S. C., § 1952 (Interstate travel in aid of racketeering).

Appellant was tried before a jury on an indictment which charged that he had traveled in interstate commerce

with intent to promote, manage, establish, carry on, and facilitate the promotion of an unlawful activity, to-wit: a business enterprise involving gambling in violation of the law of Missouri, § 563.360, R. S. Mo., 1959; and did thereafter perform and attempt to perform acts to promote, manage, establish and carry on, and facilitate the promotion, management, establishment and carrying on of said unlawful activity. He was found guilty by the jury and sentenced by the Court to three years imprisonment and a \$5,000.00 fine.

The appeal from that judgment was initially argued before a division of this Court consisting of Judges Van Oosterhout, Gibson, and Heaney. Contrary to the holding of the District Court, the panel agreed that appellant had standing to object to a search of an apartment room that he was not actually occupying, and the majority of that panel, in an opinion authored by Judge Heaney, ruled that the conviction of appellant should be reversed as evidence seized in that room was the result of an unconstitutional search. The majority felt that the affidavit in support of the search warrant did not establish probable cause. On this point Judge Gibson dissented. The numerous other points of error alleged by appellant were not considered by the panel because of the dispositive nature of the majority holding on the search warrant issue.

Thereafter, the government petitioned the Court for a rehearing en banc. Owing to the importance of the question and the division of opinion on the panel, a rehearing en banc was ordered. At this point appellant contends that a rehearing violates his constitutional protection against double jeopardy. As the government cannot generally appeal actions by the trial court, appellant contends the government cannot "appeal" decisions reached by a division of the Court. Appellant cites no authority for this position and we are not persuaded by his argument.

It is true that the government has no right to appeal in criminal cases unless specifically authorized by statute. *Umbriaco v. United States*, 258 F. 2d 625 (9 Cir. 1958); 24 C. J. S., Criminal Law, § 1659. However, this prohibition arises out of the common law and is not necessarily encompassed by the constitutional prohibition. For, as we see, 18 U. S. C., § 3731 specifically authorizes government appeals in some instances, and the exercise of this right of appeal does not necessarily violate a criminal defendant's right against double jeopardy. *United States v. Bitty*, 208 U. S. 393 (1908). See, *United States v. Ventresca*, 380 U. S. 102 (1965) in which the government secured review of an adverse Court of Appeals decision.

However, we need not pursue the matter of constitutionality of government appeals in that an appellate court's reconsideration of its own position on a question of law, is far different from an appeal from a final decision of a trial court. As long as this Court has jurisdiction over the cause, it has the express authority under Title 28, U. S. C., § 46 and § 2106 and Court Rule 15 to rehear and, if necessary, modify its decisions. *Uline v. Uline*, 205 F. 2d 870 (D. C. Cir. 1953); 14A Cyclopedic of Federal Procedure, § 68.123 (3rd Ed., 1965 Rev. Vol.); 36 C. J. S., Federal Courts, § 301(31).

This Court retains jurisdiction over a cause at least until a mandate is issued in accordance with a majority opinion. Since no mandate has issued in this case, the opinion of the panel was interlocutory and the Court retains the jurisdiction necessary to question and change any tentative decisions of the Court without subjecting appellant to any form of additional jeopardy.

Obviously, an appellate court's reconsideration of its legal opinion is completely unlike requiring a criminal defendant to stand trial a second time on a factual issue after once being acquitted. See, *Palko v. Connecticut*, 302

U. S. 319 (1937). Consequently, it has been held by the Supreme Court that even though an appellant's conviction has been ordered reversed by a Court of Appeals, the Court of Appeals still retains the power to amend or revise that reversal order upon the rehearing of the action, and its reconsideration does not subject the criminal defendant to double jeopardy. *Forman v. United States*, 361 U. S. 416, 425-426 (1960). This Court has jurisdiction to rehear the case and alter its judgment thereon without infringing upon appellant's constitutional rights. 12 Cyclopedia of Federal Procedure, § 51.178 (3rd Ed., 1965 Rev. Vol.).

A large number of questions on this appeal revolve around the search warrant used to uncover the incriminating evidence of gambling. Among these questions are: appellant's standing to question its validity, the sufficiency of the information before the issuing magistrate, the propriety of its execution, the failure to specify some of the evidence that was seized.

After lengthy surveillance of appellant the F. B. I. sought an arrest warrant and a search warrant. The affidavit in support of the search warrant was made before a United States Commissioner in St. Louis, Missouri, on August 18, 1965, and was signed by a Special Agent of the F. B. I. It related that the affiant or other agents of the F. B. I. observed appellant driving his automobile onto the eastern approaches of bridges leading from East St. Louis, Illinois to St. Louis, Missouri, on four occasions in 1965; August 6, 11:44 a. m.; August 11, 11:16 a. m.; August 12, 12:07 p. m.; August 13, 11:08 a.m. He was observed driving off of the western end of Eads Bridge in St. Louis, Missouri on two of these occasions: August 11 and August 13.

The affiant further related that appellant had been observed by federal agents driving the car into a parking

area used by residents of the Chieftain Manor Apartments at 1108 Indian Circle Drive in St. Louis, Missouri, on August 11, 4:40 p. m.; August 12, 8:46 p. m.; August 14, 8:45 p. m.; and August 16, 8:22 p. m. On August 12 appellant was observed entering the front entrance of the Chieftain Manor Apartments. On August 13 appellant was observed entering the southwest corner apartment on the second floor designated as Apartment F. On August 16, after parking his car in the lot appellant was observed walking toward the apartment building.

After this detail recitation of appellant's movements the affidavit went on to state:

"The records of the Southwestern Bell Telephone Company reflect that there are two telephones * * * (in apartment F) under the name of Grace P. Hagen * * *. The numbers * * * are WYdown 4-0029 and WYdown 4-0136."

"William Spinelli is known to this affiant and to federal law enforcement agents and local law enforcement agents as a bookmaker, an associate of bookmakers, a gambler, and an associate of gamblers."

"The Federal Bureau of Investigation has been informed by a confidential reliable informant that William Spinelli is operating a handbook and accepting wagers and disseminating wagering information by means of the telephones which have been assigned the numbers of WYdown 4-0029 and WYdown 4-0136."

On the basis of this information the Commissioner issued a warrant for the search of Apartment F of the Chieftain Manor Apartments. No oral testimony was taken.

Armed with the warrant the federal agents went directly to the apartment building and stationed themselves

in an apartment across the hall from Apartment F. After a two hour and ten minute wait, the appellant emerged from Apartment F into the hall and was served with an arrest warrant. At the same time he was served with the warrant to search the apartment. A key found on his person was used to open the apartment door. A number of agents searched the premises, while others took appellant to police headquarters. The search uncovered various items of gambling paraphernalia which were introduced against appellant and were considered as items essential to appellant's conviction.

A motion to suppress the evidence obtained in the search was timely made and overruled by the District Court on the ground that the appellant had failed to allege or show that he was legitimately upon the premises searched, and, therefore, lacked standing to object.

STANDING TO OBJECT

We feel the trial court did not apply the existing law and that defendant does have standing to object to the search of this apartment. In *Jones v. United States*, 362 U. S. 257 (1960) the defendant was charged with violating federal narcotics statutes which permit conviction upon proof of possession of the narcotics. The Supreme Court, in overruling the trial court and the Court of Appeals, held that defendant, a guest in an apartment at the time it was searched, had standing under Rule 41 (e) of the Fed. Rules of Criminal Procedure to question the validity of a search in which narcotics were seized.

To have standing to object to a search under Rule 41 (e) the defendant must be the "person aggrieved" by the search. The Fourth Amendment to the Constitution is aimed at the protection of the privacy of citizens. *Boyd v. United States*, 116 U. S. 616, 630 (1886). Therefore, to

be aggrieved by a search in violation of this Amendment a person must be able to show that his privacy was invaded by the search. Prior to *Jones*, most of the courts applied strict doctrines of common law property rights and required for standing a showing of some very significant possessory interest in the premises. *Jones*, however, supplanted this line of authority and held that if the defendant could show that he was legally upon the premises and the fruits of the search were proposed to be used against him, his privacy had been invaded to the degree necessary to give him standing to object to the search.

In *United States v. Miguel*, 340 F. 2d 812, 814 (n. 2) (2 Cir. 1965), cert. denied 382 U. S. 859, the court held that a lobby of a multi-tenant apartment was not within the protection of appellant's dwelling, but significantly stated:

"Miguel did not own the apartment on the sixteenth floor. The tenant was Miss Almerio Lewis, who allowed appellant to stay there from time to time and keep his clothes there. This gave him standing under Rule 41 (e) Fed. Rules of Cr. Proc. to object to a search of the apartment of Miss Lewis."

In *Foster v. United States*, 281 F. 2d 310 (8 Cir. 1960) we held a person using the back room of a tavern with the consent of the manager, who was his wife, might have standing to object to the search of that room even though he was absent and his wife consented to the search.

We believe *Jones*, *Miguel*, and *Foster*, clearly indicate that it is the right to use the premises that is a factor determinative of standing. If the defendant is legally occupying, or has been granted a right to occupy the premises, even though he is not physically present at the time of the search, then his privacy has been invaded by a search of these premises. As a person so aggrieved by the search he has a right to object, and to do so he need not allege his specific proprietary interest, i. e., owner,

lessee, business invitee, etc. Nor is he required to take the stand to establish his particular interest.

In the case before us, appellant's right to be on the premises is established by inference from the allegations in the indictment, the statements in the affidavit in support of the search warrant, and the testimony developed at the hearing to suppress. Appellant had been seen using the tenant's parking lot. He was seen entering the apartment alone on August 13, and was seen entering or approaching the apartment building on at least two other occasions. On the day the search warrant was executed appellant was alone in the apartment for at least two hours. When he was arrested immediately upon emerging from the door of Apartment F, he had a key to this apartment on his person.

The government's argument that appellant is not entitled to standing because he was arrested and served with the search warrant in the hall immediately outside the apartment is without merit. As we stated, the determinative factor in assessing appellant's constitutional right to privacy, and consequently his standing to object to a search, is his legal right to use these premises. The fact that appellant was in the act of voluntarily leaving the apartment when served does not weaken his right to be on these premises. Appellant's basic constitutional right of privacy cannot be circumvented by the expedient of withholding service of a warrant until the moment the accused is in the act of leaving the premises to be searched.

Consequently, we believe the evidence before the trial judge established that appellant had sufficient interest in the premises to be a "person aggrieved" by the search, and thus has standing to raise the question of the sufficiency of the showing of probable cause supporting the warrant.

PROBABLE CAUSE

The United States Commissioner in issuing the search warrant believed from the information in the affidavit that there was probable cause to believe the law was being violated on the described premises.

Our duty on this appeal is not to make our independent determination of probable cause. Our duty is solely limited to the determination of whether the information before the Commissioner was legally capable of persuading him, as a man of reasonable caution, that the laws of the United States were being violated with part of this violation consisting of an illegal act being committed on the described premises. *Wong Sun v. United States*, 371 U. S. 471, 479 (1963); *Brinegar v. United States*, 338 U. S. 160 (1949).

If the information in the affidavit, in its totality, provided the Commissioner with a substantial basis to conclude that a gambling business was being conducted on the premises and the appellant was engaged in interstate travel in connection therewith, nothing more is required of us. The finding of the Commissioner must be sustained. *Rugendorf v. United States*, 376 U. S. 528, 533 (1964); *Jones v. United States*, 362 U. S. 257 (1960).

Upon viewing all of the information in the affidavit we do not believe we can say, as a matter of law, that the conclusion reached by the Commissioner is without substantial basis and could not possibly be drawn by a "neutral and detached magistrate". Thus the warrant must be upheld.

The affidavit, to establish an essential element of the federal crime, sets forth repeated observations of interstate travel. Four additional evidentiary facts tend to support the finding of the Commissioner that there is

probable cause to believe illegal gambling activities were taking place on the described premises.

1. The affidavit set forth in detail appellant's repeated visits at approximately the same time in the afternoon to an apartment that was not his home.
2. The affidavit set forth information received from the telephone company that this apartment visited by appellant had two telephones with different numbers.
3. The affiant recited of his personal knowledge that appellant was a gambler, a bookmaker, and an associate of gamblers and bookmakers.
4. The affiant stated that the F. B. I. had been informed by a reliable informant that Spinelli was "operating a handbook and accepting wagers and disseminating wagering information by means of the telephones"

We agree that if these individual pieces of information were viewed in isolation, each would probably not independently support a constitutional warrant. However, they should not be so viewed. When viewed in their totality, they together form a relatively composite picture of appellant visiting the described apartment for the purpose of conducting gambling activities. See the warrant approved in *United States v. Whiting*, 311 F. 2d 191 (4 Cir. 1962), cert. denied 372 U. S. 935, and the arrest in *Hernandez v. United States*, 353 F. 2d 624, 627-628 (9 Cir. 1965), cert. denied 384 U. S. 1008.

As a series of seemingly innocuous bits of evidence can combine to form a web of circumstantial evidence sufficient to justify jury conviction, in the same manner independent facts can combine to form a sufficiently clear picture of a probable violation of the law to justify a magistrate in issuing a constitutional warrant. *United States v. Pinkerman*, 374 F. 2d 988, 991 (4 Cir. 1967). See also, *Christensen v. United States*, 259 F. 2d 192, 193

(D. C. Cir. 1958); *Hernandez v. United States*, *supra*, at page 628.

The repeated afternoon visits to an apartment away from one's home, could well have many legal purposes. However, it is a slightly suspicious fact warranting some note, and it takes on added significance when coupled with other known factors. Pointing out that the frequently visited apartment has two telephones adds a bit more to the suspicion. Though one may have numerous legal uses for two independent telephone lines in a private apartment they are somewhat unusual, and are suspicious to the degree that multiple telephones are a common characteristic of a gambling operation. When a person who frequently visits the apartment with the two telephones is known to be a gambler, a bookmaker and an associate of gamblers and bookmakers, vague suspicions begin to take form that gambling may be taking place in this apartment.

Finally, when the hearsay information is provided, coming from one sworn to be reliable, that the known gambler who visits the apartment with two phones is actually conducting gambling activities over these phones, setting forth the exact telephone numbers, we believe these established suspicions could validly ripen into a reasonable belief that a gambling business is being conducted on the premises. A magistrate who issues a warrant on the basis of this information is certainly not abusing the warrant process. Nor could it be said, as a matter of law that he could not have made an independent determination of the issue. An independent determination of a magistrate has indeed been interposed between the citizen and the police. *McDonald v. United States*, 335 U. S. 451 (1948).

Of course, it could be argued that this evidence is a long way from certainty. We are, however, dealing not with certainty, but with probable cause, and:

"In dealing with probable cause . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved." *Brinegar v. United States*, 338 U. S. 160, 175 (1949).

Probable cause is more than suspicion, but it is far less than the evidence sufficient to justify the conviction. *Locke v. United States*, 7 Cranch 339 (1819). In fact, the evidence in support of a warrant may consist entirely of hearsay or otherwise incompetent evidence. *Aguilar v. Texas*, 378 U. S. 108 (1964); *Hodgdon v. United States*, 365 F. 2d 679, 684 (8 Cir. 1966); *Jackson v. United States*, 302 F. 2d 194, 197 (D. C. Cir. 1962).

Indeed, even less evidence is needed for the probable cause justifying the issuance of a warrant than the probable cause necessary for an officer to act without a warrant. *Aguilar v. Texas*, supra; *Johnson v. United States*, 333 U. S. 10 (1948). The exigencies of law enforcement demand that an applying officer need not prove, in a full-blown plenary hearing, that the suspect has, beyond a reasonable doubt, committed a violation of the law. He need only demonstrate a probability. We are dealing herein with a threshold of proof using layman's terms that is more than suspicion but is obviously far less than certainty.

Relying primarily upon *Aguilar v. Texas*, supra, appellant argues that the hearsay statement from the informer, as the core of this affidavit, cannot support the finding of probable cause. We think not. It is well established that informer statements may serve as the basis for probable cause if the statements are "reasonably corroborated by other matters" brought to the attention of the magis-

trate. *Jones v. United States*, 362 U. S. 257 (1960); *Rosen-
cranz v. United States*, 356 F. 2d 310, 314 (1 Cir. 1967);
Hodgdon v. United States, 365 F. 2d 679 (8 Cir. 1966).

In the recent case of *McCray v. Illinois*, ... U. S. ... (March 20, 1967), an informant told police officers that McCray would be on a given street corner at a particular time and that he would be in the possession of narcotics. At the appointed time McCray appeared at the designated corner and was pointed out to the officers by the informant. The officers arrested McCray without a warrant and discovered the narcotics. The majority of the Supreme Court held that the fact McCray was where the informant said he would be was sufficient circumstance underlying the informant's information to give the officers the probable cause necessary to make a constitutional arrest.

Very similarly in *Draper v. United States*, 358 U. S. 307 (1959), the police were given a description of a man they were told would be carrying narcotics. When the officers went to the appointed place at the appointed time they recognized petitioner by the description given them by the informant. With nothing more they arrested appellant without a warrant and subjected him to a search. The Supreme Court determined that the officers had the necessary probable cause when the informer's reliability was verified by what they actually observed of the appellant's presence and personal appearance.

The Court has consistently demanded a higher showing of probable cause when the officer is acting without a warrant than it would if the issuance of the warrant followed the detached consideration of an independent judicial officer. Yet we note that both of these Supreme Court cases involved arrests made without warrants, followed by searches uncovering incriminating evidence. And in each the only substantiation of the informer's information was that the appellants were at a time and place specified by

the informer (plus in *Draper* the accused corresponded to a description given by the informer). The personal observation by the officers in these cases, of course, established to a degree the basic reliability of the informer, but added no corroboration or underlying justification to the factual statement that the accused possessed narcotics. But regardless of the substantially higher standard of probable cause demanded of actions without warrants, these arrests were sanctioned by the Court. Certainly, the corroboration of the informers' statement in these two cases is far less than the detail corroborative facts before us, which substantiate both the informer's basic reliability and the accuracy of the factual statement that Spinelli was conducting gambling operations on the premises.

In the case before us, the informant, who was sworn to be reliable, stated that Spinelli was "operating a handbook and accepting wagers and disseminating wagering information by means of the telephones [numbered] WY-down 4-0029 and WYdown 4-0136."

This information cannot be simply classified as a conclusion. It is a statement that entails no imprimatur of a legal concept to bring into being, nor does it require the analysis of an expert. It is a simple statement of fact, using direct and simple words that cannot be reduced to a lower level of inference. Of course, it would have been preferable if the informer had buttressed his statement with additional information as to how he acquired knowledge of these facts. But this shortcoming does not mean that his statement is anything other than a simple factual summary.

Furthermore, the underlying accuracy of this hearsay statement is corroborated by the information from the telephone company that the telephone numbers recited by the informer are the numbers actually in existence and

installed in the apartment. As in *McCray* and *Draper* the reliability of the informer's information is even further substantiated by the personal observations of the agents. They observed Spinelli entering the very apartment where the phones specified by the informant were located, and consequently where the illegal activity was, according to the informer's information, supposedly taking place. Finally, the allegedly conclusionary information that Spinelli was gambling on these premises is substantiated, to a degree, by the fact of Spinelli's repeated visits, the presence of the two telephones, and the personal knowledge of affiant that Spinelli was a gambler and an associate of gamblers. We believe these facts presented to the Commissioner are far stronger than those in *McCray* and *Draper*, and that they combine to solidly confirm, support, verify and substantiate the accuracy and reliability of the informer's statement.

The conclusion to be drawn from an analysis of these cases is clear. Applying a higher standard of probable cause than must be applied in the case before us, the Supreme Court has upheld in *McCray* and *Draper* official police action supported by far less factual justification. Consequently, unless that Court requires a higher degree of substantiation to a lower standard of probable cause, we must assume they would declare the warrant to be constitutional. In the light of the holdings in *McCray* and *Draper*, if we were to strike down the warrant in the case before us we would be requiring a more exacting standard of probable cause when the officers present their information to a magistrate and act on the authority of a warrant issued by him than we would if the officers acted on this information without securing a warrant. This is not and should not be the law.

Appellant contends that *Aguilar v. Texas*, supra, is to the contrary. We do not believe that it is. *Aguilar* is only

a caveat to the general principles governing probable cause and is not a replacement of those principles. *Aguilar* was directed to the specific situation in which a warrant was based solely upon the hearsay conclusion of a third party informant, and the majority found that without elaboration of "underlying circumstances" this bare conclusion could not provide a magistrate with the substantial basis necessary for a finding of probable cause. However, there is nothing in *Aguilar* which holds that a hearsay conclusion has no probative value, and when coupled with other pieces of information that tend to substantiate the reliability of that conclusion, a valid warrant may not be issued. *Miller v. Sigler*, 353 F. 2d 424 (8 Cir. 1965), cert. denied 384 U. S. 980. In fact, footnote 1 in *Aguilar* specifically stated:

"The record does not reveal, nor is it claimed, that any other information was brought to the attention of the [magistrate]. * * * If the facts and results of such a surveillance had been appropriately presented to the magistrate, this would, of course, present an entirely different case."

As other facts and circumstances were presented to the Commissioner in the case before us, we believe it presents "an entirely different case" and is not controlled by *Aguilar*. See, *Minovits v. United States*, 298 F. 2d 682 (D. C. Cir. 1962).

Riggan v. Virginia, 384 U. S. 152 (1966) does nothing to alter that position. The Court in *Riggan*, without opinion, struck down an affidavit which curtly recited that the application for a warrant was based upon, "personal observation of the premises and information from sources believed by the police to be reliable."¹ Certainly, this in-

¹ This information was taken from *Riggan v. Commonwealth*, 144 S. E. 2d 298, 299 (n. 1) (Va. 1965). There is nothing to indicate that the recital of facts in the opinion of Mr. Justice Clark, dissenting from the majority's per curiam reversal was actually before the issuing magistrate.

formation in *Riggan* is little, if any, better than the bare conclusion condemned in *Aguilar*; and is far less than the detailed recital found in the affidavit before us. Nor do we believe that *Gillespie v. United States*, 368 F. 2d 1 (8 Cir. 1966) is determinative. In that case we held that orally stating to a magistrate that the suspect had a wagering stamp and that affiant had "obtained information that he [the suspect] was currently in the gambling business", was insufficient probable cause for a warrant to search his residence.

Riggan and *Gillespie* set forth, at most, two evidentiary elements. *Riggan* contained: (1) personal observation (without stating what was observed), and (2) informant's information (without specifying the information). The *Gillespie* affiant stated: (1) Gillespie had a gambling stamp, and (2) an informant stated that Gillespie was currently in the gambling business (failing to set forth where the business was being conducted). However, in the case before us we have not two bare pieces of information, but four evidentiary facts, with each fact being explained in detail not even approximated in either *Riggan* or *Gillespie*.

Though we are convinced there was solid justification for the Commissioner's action, even if we assume this to be a close question, the Commissioner's finding is entitled to significant weight, *United States v. Ramirez*, 279 F. 2d 712, 716 (2 Cir. 1960), cert. denied 364 U. S. 850, and in close cases the decisions should tip in favor of the warrant's issuance. In so holding the Court in *United States v. Ventresca*, 380 U. S. 102, 108 (1965) stated:

"If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants * * * must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. * * * Technical requirements

of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting."

We believe this is a positive indication of the Supreme Court's unwillingness to further expand the requirements and technical burdens for a constitutional warrant and is certainly sound advice that should be heeded. In our view neither *Aguilar* or *Riggan* demand a reversal of this case. If we were to strike down the warrant now before us we would be taking a significant step beyond the specific demands of these cases and would be acting in direct derogation of the clear instructions in *Ventresca*.

If we were to demand further hyper-technical requirements we would approach the now discarded pitfalls of common law pleading in which the ritualistic recitation of a few essentially meaningless, but apparently "magical words"; made the difference between a case being dismissed on a procedural technicality or justice being dispensed upon the merits.

We believe the holdings in *Aguilar* and *Gillespie* coupled with the established law for determination of probable cause sufficiently protect the privacy of individuals from hastily conceived intrusions.

The Fourth Amendment was a reaction to the evils of the use of the general warrant in England and the writs of assistance in the Colonies, and was intended to protect against invasions into the privacies of life under indiscriminate general authority. *Warden v. Hayden*, U. S. (May 29, 1967).

Certainly, we have no unjustified invasion into the privacies of Spinelli's life under a general authority. This

was no haphazard intrusion into Spinelli's affairs. The agents meticulously observed his interstate travel and his attendance at the indicated scene of gambling operations, which they had investigated to the extent necessary to corroborate the information received from various sources.

There is no evidence in this case of an officious disregard of Spinelli's personal constitutional rights of any regard of harassment of Spinelli. Those engaged in illegal activities do not and should not have any greater rights than law-abiding citizens. Law enforcement officials are charged with the duty and responsibility of investigating those believed of engaging in criminal activity and a search warrant is but a legal tool of enforcement. Its efficacy should not be eroded by super-technical requirements that cause two trials, one on the issue of proving guilt before obtaining admissible evidence by way of a search warrant—a procedural issue, and one on the issue of guilt. Probable cause protects the innocent and need not serve as a shield for the guilty.

We believe any significant increase in the demands already placed upon securing a valid warrant are unnecessary under the present law, unneeded for the protection of individual rights of privacy, and dangerous to effective law enforcement. We believe the warrant was validly issued.

EXECUTION OF THE WARRANT

After securing the search warrant from the United States Commissioner the federal officers went to the Chieftain Manor Apartments. They arrived at approximately 4:55 p. m. and stationed themselves in an apartment across the hall from the apartment to be searched. They waited until 7:05 p. m. when Spinelli was seen emerging from Apartment F. At this time Spinelli was arrested and Apartment F searched.

Appellant points to Rule 41 (c), Fed. R. Crim. P., which demands that warrants "shall command the officer to search forthwith" Appellant contends that the two hour, ten minute delay in the execution of the warrant was not a "search forthwith" as required by the rule and commanded by the warrant, and the evidence seized in the search should be suppressed.

We do not agree. Rule 41(c) and (d), Fed. R. Crim. P., provide the framework for the execution of warrants in which reasonable police latitude can be exercised. Though warrants are required to command execution "forthwith", Rule 41(d) provides that "The warrant may be executed and returned only within ten days after its date." We agree with appellant that this ten-day period is the maximum under the Rule, and the requirement of execution "forthwith", according to the facts and circumstances of each case, may indeed require search and seizure in something less than this ten-day period. However, the rule carefully refuses to set down exactly what is meant by the term "forthwith". Presumably this was left for the courts to determine on a case-by-case basis. Consistent with this flexible approach we believe that a warrant is executed "forthwith" if it is executed within a reasonable time after its issuance, not exceeding ten days. What is a "reasonable time" must be determined by the individual circumstances of each case.

A warrant is issued upon allegation of presently existing facts, and as such does not allow execution at the leisure of the police; nor does it invest the police officers with the discretion to execute the warrant at any time within ten days believed by them to be the most advantageous. *Mitchell v. United States*, 258 F. 2d 435 (D. C. Cir. 1958) (concurring opinion).

A warrant is a court order requiring the police to perform a ministerial function. They must be allowed certain

leeway in the performance of this duty, but likewise they must be required to diligently perform according to the court's command. A lapse of up to ten days may be reasonable when the delay is caused by distance, traffic conditions, weather, inability to locate the person or premises to be searched, personal safety, etc. However, a delay of a few hours may be unreasonable if the police are not diligent in executing the warrant and the purpose of the delay was to prejudice the rights of a suspect.

Appellant points out that after receiving the warrant the police officers delayed execution for approximately two hours while the premises were kept under surveillance. This appellant contends was an unreasonable delay.

Certainly, at first glance, at least, the execution of a warrant on the date of issue within hours after the officers left the Commissioner's office would seem to be execution "forthwith." Neither the rule, nor the warrant require execution "immediately." While unreasonable delay cannot be countenanced, still officers must be allowed a certain latitude of action when they are on the delicate and sometimes dangerous mission of executing warrants. In this case, had the officers knocked at the door the evidence of gambling might well have been flushed down the commode before the officers could have forced their way into the apartment. In light of the necessary latitude it is very doubtful that this short delay was unreasonable and thus constituted a failure to execute "forthwith" as required by the rule and the warrant.

However, the reasonableness of the officers' conduct in this case and exactly how many hours or minutes a police officer is allowed to delay execution to the prejudice of a suspect we need not decide. To object to the failure of the police to "search forthwith" the complaining party must point to some definite legal prejudice attributable to this unjustified delay. The fact that the search un-

covered prejudicial evidence does not invest standing unless the presence of the evidence is attributable to the delay. Unjustified attempts by the police to prejudice the suspect by delay in execution do not provide standing unless the police are successful in their efforts. Investigative technics of the police or hypothetical harms invest no standing to suppress evidence seized in an otherwise lawful search.

As we have upheld appellant's standing to challenge the constitutionality of the warrant even though he was in the hall outside the apartment, and since appellant has demonstrated no other possible prejudice attributable to the two hour lapse, we do not believe appellant has any proper grounds to object to the short delay.

DESCRIPTION OF THE PROPERTY SEIZED.

The warrant specified for seizure "bookmaking paraphernalia, scratch sheets, bet tabs, pay and collection sheets, bookmaking records, baseball schedules, books and records of bets received, accounts, bookmaker's ledger sheets, two telephones."

Among the items seized which appellant contends are not included in the above specified items are, an Underwood adding machine, a pencil sharpener, a stack of blank deposit tickets on the State Bank of Wellston, a G. E. AM-FM radio, \$22.00 in currency, a pair of glasses, Timex watch, pads of graph paper, four pens, two pencils, lease of the premises, and five telephones.

All of this evidence would fall, we believe, within the broad category of "bookmaking paraphernalia" set forth in the warrant. As stated in the government's brief, "Certain records are to be kept, calls to be made, computations to be determined, money to be dispensed, times

to be ascertained, results to be received from various sporting engagements." All of the seized items were instrumentalities of the various facets of the bookmaking business and were properly seized as "bookmaking paraphernalia."

To the complaint that "bookmaking paraphernalia" is unconstitutionally vague, we must reply that law enforcement officials have practically no way of ascertaining in advance of a search exactly what sort of innocent, everyday materials and equipment utilized for gaming purposes might be in a private dwelling. The law cannot expect the impossible. When the circumstances of the crime make an exact description of the fruits and instrumentalities a virtual impossibility, the searching officer can only be expected to describe the generic class of items he is seeking. The degree of specificity, thus, must vary with the circumstances and with the type of items to be seized. The specificity required for the seizure of goods whose identity is known, such as stolen goods, should not be demanded when officers are searching for such items as secreted gaming equipment, the identity of which cannot be specifically ascertained. *Calo v. United States*, 338 F. 2d 793 (1 Cir. 1964); *Nuckols v. United States*, 99 F. 2d 353 (D. C. Cir. 1938), cert. denied 305 U. S. 626.

We believe a warrant describing the items to be seized simply as "bookmaking paraphernalia", under the circumstances, describes with sufficient particularity the goods for which the police are searching. The items seized under the authority of this warrant, clearly being within the generic classification of "bookmaking paraphernalia", were properly received in evidence.

DENIAL OF A PRELIMINARY HEARING

Appellant was arrested on August 18, 1965. He was released on bond the next day and his preliminary hearing set for September 3, 1965. Upon motion of the government his preliminary hearing was continued. On September 15, 1965 the grand jury returned an indictment against appellant. Because of this indictment appellant was never afforded a preliminary hearing before the Commissioner. Appellant contends that the indictment should be dismissed as it was tainted by the government's willful avoidance of the preliminary hearing. We do not agree.

The right of indictment by grand jury is, of course, a constitutional protection afforded all persons accused of federal crimes. Standing alone this right could prove to be something of a handicap. Waiting for the relative slow procedure of grand jury indictment might require arrested individuals to spend long periods of time in jail on groundless charges. Rule 5 (c), Fed. R. Crim. P. serves as a complement to the constitutionally necessary grand jury system. Though the preliminary hearing provided for in Rule 5 (c) may be a practical tool for discovery by the accused, the only legal justification for its existence is to protect innocent accuseds from languishing in jail on totally baseless accusations. Therefore, before the accused may be held for grand jury presentment Rule 5 (c) requires the government to justify its incarceration by proving in a preliminary hearing before a judicial officer that there is probable cause to believe the accused committed the charged offense. *Barrett v. United States*, 270 F. 2d 772, 775 (8 Cir. 1959). If the grand jury returns a true bill prior to the time a preliminary hearing is held, the whole purpose and justification of the preliminary hearing has been satisfied. *Vincent v. United States*, 337 F. 2d 891 (8 Cir. 1964), cert. denied 380 U. S. 988. Action

by a grand jury in returning the indictment brings formal charges against the accused and thus supersedes the complaint procedure and eliminates the necessity of a preliminary hearing. *Jaben v. United States*, 381 U. S. 214 (1965).

Appellant admits that the Commissioner has authority to grant continuances, but argues that to grant a continuance for the purpose of obtaining an indictment is contrary to the spirit of the rules. This very question was answered to the contrary in *Byrnes v. United States*, 327 F. 2d 825, 834 (9 Cir. 1964), cert. denied 377 U. S. 970. That case held the reason behind the government's request for a continuance was speculation. Even so, the grant of a week continuance even for the purpose of allowing grand jury indictment was not improper absent a showing of legal prejudice. In the same light, we do not see anything inherently inequitable with continuing a preliminary hearing for a short period of time to allow intervening grand jury action. Though appellant might well have enjoyed the discovery benefits that flow from a preliminary hearing, he has no absolute right to these benefits if the underlying purpose of the preliminary hearing is supplanted.

As appellant in the case before us was free on bail and the indictment was returned only twelve days after the first scheduled preliminary hearing, we believe the Commissioner was well within his discretionary rights in continuing the preliminary hearing. On this issue we need go no further.

THE INDICTMENT

Appellant charges that the indictment is laced with a multitude of defects. According to appellant 18 U. S. C. § 1952, on which the indictment is based, is so vague

that it does not give adequate notice of the law and thus violates his constitutional right to due process under the Fifth Amendment. Every court faced with this argument has rejected it. The statute embraces terms of common understanding and describes a clear standard of conduct. Consequently, the statute on which this indictment is based is not unconstitutionally vague. *Bass v. United States*, 324 F. 2d 168 (8 Cir. 1963); *United States v. Zizzo*, 338 F. 2d 577 (6 Cir. 1964), cert. denied 381 U. S. 915; *Turf Center, Inc. v. United States*, 325 F. 2d 793 (9 Cir. 1963); *United States v. Smith*, 209 F. Supp. 907 (E. D. Ill. 1962).

Though the indictment makes its charge in one count and is framed in the language of 18 U. S. C. § 1952 appellant alleges that it violates Rule 7. (c) Fed. R. Crim. P., which requires "plain, concise and definite written statement of the essential facts constituting the offense charged." An indictment couched in the terms of the statute, as this one is, is usually considered to comply with the rule. *Reynolds v. United States*, 225 F. 2d 123 (5 Cir. 1955), cert. denied 350 U. S. 914; *Brown v. United States*, 222 F. 2d 293 (9 Cir. 1955).

An indictment is good if it informs the defendant of the offense with which he is charged with sufficient specificity to enable him to prepare his defense and protects him against future jeopardy. *Rood v. United States*, 340 F. 2d 506 (8 Cir. 1965), cert. denied 381 U. S. 906. We believe this indictment, framed in the terms of the statute, measures up to that standard. *Turf Center, Inc. v. United States*, 325 F. 2d 793 (9 Cir. 1963); *United States v. Teemer*, 214 F. Supp. 952 (N. D. West Va. 1963).

In much the same vein appellant alleges that the trial court should have required the government to elect precisely under what provision of the statute appellant was being charged. According to appellant the indictment charges a multitude of sins and the government should

elect as to whether appellant was promoting, or managing, or establishing or carrying on the unlawful activity designated. Rule 14, Fed. R. Crim. P., governing joinders, gives a District Court the power to grant the "relief justice requires", but is framed in permissive, not mandatory language. The grant of relief requiring the government to narrow its charge or elect the precise segments of the statute on which it is relying is a matter resting in the sound discretion of the trial court, the exercise of which is not subject to review unless abused. *Pointer v. United States*, 151 U. S. 396 (1894). As we held, the indictment adequately informed the accused of the charges against him. The slight difficulty of preparing a defense to such broadly worded charges does not outweigh the difficulty and potential prejudice faced by the government in being forced to limit its presentations to a restricted area of proof. No abuse of discretion has been shown.

In an attempt to approach this problem from an alternate route, appellant moved that the government supply him with a bill of particulars pursuant to Rule 7 (f) Fed. R. Crim. P. The excellent opinion of Judge (later Justice) Whittaker in *United States v. Smith*, 16 F. R. D. 372, 374-375 (W. D. Mo. 1954), establishes the general principles in this regard. It is the proper office of a bill of particulars,

"to furnish to the defendant further information respecting the charge stated in the indictment when necessary to the preparation of his defense, and to avoid prejudicial surprise at the trial,' and when necessary for those purposes, is to be granted even though it requires 'the furnishing of information which in other circumstances would not be required because evidentiary in nature,' * * *."

This liberal policy was followed when the trial court granted partial relief to appellant by ordering the govern-

ment to inform him of the location, dates, and method of operation of the alleged gambling activity. This, we believe, furnished appellant with the additional information necessary to prepare his defense and avoid prejudicial surprise.

The balance of appellant's requests, however, were properly denied. A refused portion of appellant's motion sought information as to the "exact nature and details of the manner in which" the promotion, management, establishment, carrying on, and facilitating the gambling activity was performed. As the government was under order to advise appellant of the necessary facts in connection with charge, he was properly informed.

On the other hand, the granting of appellant's request would have the severely damaging effect of "freezing" the government's evidence in advance of trial. See, 8 Moore's Federal Practice, § 7.06 [1]. The denial of this request for supplementary evidence was not an abuse of the trial court's broad discretion in this area. *Wong Tai v. United States*, 273 U. S. 77, 82 (1927).

Appellant also desired to discover from the government exactly how the government believed § 563.360 of the Missouri Revised Statutes was violated. The text of the statute is, of course, available to appellant, and he was also informed as to the exact dates, location and alleged method of illegal activity. Requiring the government to specify exactly how it believed appellant violated this state statute would be to require the government to disclose either its legal theory of the case or furnish unnecessary evidentiary facts as to appellant's method of operation. In either case this is not information normally securable by a bill of particulars, and thus the trial court did not abuse its discretion when the motion pertaining to this request was denied. *United States v. Ansani*, 240 F. 2d 216 (7 Cir. 1957), cert. denied 353 U. S. 936; *Kempe*

v. *United States*, 151 F. 2d 680, 685 (8 Cir. 1945), cert. denied 331 U. S. 843.

Finally, appellant sought in his motion the names and addresses of other persons allegedly engaged in this gambling activity. This is a thinly veiled request for the identity of potential witnesses, and the government is not normally required to supply such information to the criminal defendant. The trial court's denial of this request was well within its permissive powers. *Bohn v. United States*, 260 F. 2d 773 (8 Cir. 1958), cert. denied 358 U. S. 931.

Appellant contends that the indictment did not charge a crime within the spirit or intent of § 1952, as he was, at most, a single small-time gambler not engaged in an interstate business enterprise. Section 1952 makes it a federal crime to travel in interstate commerce with the intent to promote unlawful activity and thereafter attempt or commit the unlawful act. Congress defined "illegal activity" to mean, among other things, "any business enterprise involving gambling * * * in violation of the laws of the state in which [it was] committed." Other than requiring the unlawful activity, as it applies to gambling, it must be a "business enterprise."

Congress made no attempt to differentiate the business enterprises of a national crime syndicate and a petty hoodlum. No attempt was made to establish a minimum number of individuals that had to be involved, nor was a necessary dollar amount placed upon the illegal activity. It is virtually impossible for us to judicially specify in any meaningful fashion how large an operation a racketeer must have before he comes within the spirit of the clear prohibitions of this section. As long as it is established that a defendant is engaged in a proscribed gambling activity as a "business enterprise", we will make no attempt to draw a line between the "big time" operator,

who is admittedly subject to the federal prohibitions, and the "small" operator, who, according to appellant, should remain immune from the demands of the law.

Though the statute was admittedly enacted to curb interstate racketeering, the purposes of the statute are well served by thwarting the small time interstate racketeer before he has a chance to expand his illegal activities. Therefore, if the government can establish the interstate travel with the requisite intent and the illegal "business enterprise" no attempt will be made by us to exempt the less prosperous entrepreneurs from the operation of this statute.

The evidence indicates that Spinelli was not a casual offender engaging in a Friday night game of cards with some friends in Missouri. He was a racketeer committing regular and significant violations of the Missouri law. He made regular and repeated trips across the state line, and over a long period of time was involved in a very substantial gambling business. The prosecuting officials did not abuse their powers by bringing charges against Spinelli and the trial court properly sustained the validity of the charge.

Appellant has rather vaguely attacked the constitutionality of § 1952, on which the indictment is based, by simply listing without explanation the various constitutional provisions he believed this statute violates.

1. We have already held that the statute gives proper notice and is therefore not unconstitutionally vague.
2. There is no equal protection of law running against actions of the federal government. And the fact that a federal criminal statute is based in part upon conduct proscribed by state law does not violate due process simply because of variations in the law of the several states.

Turf Center, Inc. v. United States, 325 F. 2d 793 (9 Cir. 1963). See also, *Clark Distilling Company v. Western Maryland Railway Company*, 242 U. S. 311 (1917).

3. The statute regulating interstate travel for the purpose of engaging or controlling illegal activity is within the interstate regulatory powers vested in the federal government, and therefore is not a usurpation of the powers reserved to the states by the Tenth Amendment. *United States v. Zizzo*, 338 F. 2d 577 (7 Cir. 1964), cert. denied 381 U. S. 915; *United States v. Kelley*, 254 F. Supp. 9 (S. D. N. Y. 1966); *United States v. Ryan*, 213 F. Supp. 763 (D. Colo. 1963).

4. The substantive violation of this statute took place when appellant crossed into Missouri with the requisite intent and thereafter attempted or committed an illegal act in Missouri. The crime was, therefore, committed in Missouri. Appellant was tried in the United States District Court for the Eastern District of Missouri. Appellant's allegation of a violation of his Sixth Amendment right to be tried in the district in which the crime was committed, has obviously not been violated.

5. As appellant has not alleged that he has been tried on this charge before, the allegation of double jeopardy has no present basis. As we have held that the statute and the indictment adequately state the nature of the proscribed conduct with which Spinelli is charged, he is fully protected against future jeopardy on these charges. He is further protected from repeated jeopardy by the fact that the allegation of violation of § 1952 is in the conjunctive. The general verdict thereon will bar any further prosecutions with respect to any of the particular allegations embraced in the broad wording of the charge. *Turf Center, Inc. v. United States*, supra.

6. Finally, we do not see, nor has appellant pointed out any critical relationship between the prohibitions of this

statute and the First Amendment freedoms of assembly and speech. While protecting all forms of valid expression, this Amendment does not protect antisocial conduct which the government has a valid interest in proscribing. *United States v. Smith*, 209 F. Supp. 907 (E. D. Ill. 1962).

We believe the statute is constitutional and an indictment based thereon is valid.

POST ARREST STATEMENTS

Appellant was arrested at approximately 7:05 p. m. and was placed in the City Jail. The following morning he was brought before the United States Commissioner and in the presence of his attorney was advised of his constitutional rights. Bail was set by the Commissioner. Thereafter, while appellant was being processed for release he was asked by Deputy United States Marshal Whitlock where he lived. Spinelli gave an Illinois address. Upon release he presented himself to F. B. I. Agent Bender and asked for the return of some keys. He indicated that one of the keys was to the "residence or the place where he was staying on the east side [Illinois]." Both of these incidents were related at trial and were introduced to prove appellant's Illinois residence and consequently the interstate travel necessary for a federal crime. Appellant objects to this evidence on the basis of the decisions in *Miranda v. Arizona*, 384 U. S. 436 (1966), and *Escobedo v. Illinois*, 378 U. S. 478 (1964).

Appellant was tried and convicted in March, 1966. *Miranda v. Arizona* was decided June 13, 1966. *Johnson v. New Jersey*, 384 U. S. 719 (1966) decided that *Miranda* should have prospective application only. Thus, *Miranda* need play no part in the consideration of the case before us. *Escobedo v. Illinois* pre-dated Spinelli's trial and its requirements would apply if applicable to the issue raised.

The exclusionary rule found in *Escobedo*, as in many other cases, is founded largely upon the proposition that the government must respect the constitutional rights of its citizens. To protect individual rights the evidence obtained in derogation thereof is not admissible in the courts. Therefore, for the exclusionary rule to apply herein, appellant need prove some unconstitutional actions by governmental officials.

In *Escobedo* the defendant was not brought before a magistrate or advised of his right to remain silent. Even though he specifically requested the advice of his attorney and his attorney was in the building attempting to see the defendant, the request for counsel was denied.

The actions of the governmental agents in the case before us can, in no way, be equated with the denial of counsel in the *Escobedo* case. A short time after being presented to the Commissioner and advised of his rights in the presence of his attorney, Spinelli voluntarily gave an Illinois address to Deputy Marshal Whitlock for the purpose of being released on bond. No request for advice or for counsel was made or denied. This request for administrative information necessary for release from custody is proper and is completely unlike and unrelated to the serious abuses found in *Escobedo*.

Furthermore, we do not believe this request for information violates appellant's Fifth Amendment privilege against self-incrimination. Appellant was not required to ask for release on bond, but if released the governmental officials have a right and duty to the public to know where appellant can be found. Appellant need not answer the questions put to him if he feels they might lead to his incrimination, but once he has decided to answer he may not retroactively claim that his privilege has been violated. Neither *Escobedo*, nor any other case of which we are

aware, forbids the asking of questions simply because they could produce incriminating evidence.

Appellant argues that he was coerced into incriminating himself because his refusal to answer would have resulted in his being denied bail. Though we admit that appellant was faced with a difficult choice, it was a choice that necessarily had to be made. Address information prior to release on bond is an absolute necessity for the efficient administration of the bail system. When asked for this information the accused must weigh the competing circumstances and decide which course he should take.

In much the same way the accused must decide whether to testify at trial and subject himself to cross-examination or remain silent. Simply because certain advantages are to be gained by waiving Fifth Amendment rights does not mean that their waiver was coerced. The advantage which flows as a consequence of the law must be distinguished from coercive promises or threats from individual police officers. If an accused decides as a matter of free will to furnish information necessary and relevant to obtain a release on bail, it does not follow as a matter of constitutional law that this information was coerced from him.

The second statement, the one given to Agent Bender, was given after Spinelli had been released on bond. This information was volunteered and not the result of any interrogation. Furthermore, as appellant was free on bond the conversation did not take place while defendant was in the custody of the police. *Escobedo* simply has no application to this set of circumstances.

It is our conclusion that neither of the pieces of evidence were obtained in violation of appellant's right to counsel or in derogation of his freedom from self-incrimi-

nation. See, *United States v. Zizzo*, 338 F. 2d 577. (7 Cir. 1964), cert. denied 381 U. S. 915. As Spinelli's trial preceded the decision in *Miranda v. Arizona*, we need not decide whether the positive duties placed upon arresting officers would affect the admissibility of the evidence herein.

ADMISSION OF EVIDENCE

The admission or rejection of offered evidence is a matter generally left largely within the discretion of the trial court. *Cotton v. United States*, 251 F. 2d 673, 676, (8 Cir. 1966). We have viewed appellant's two objection to the admission of evidence and feel neither warrants a finding by us that the trial court abused its discretion.

Appellant objected to expert testimony of an F. B. I. agent concerning the gambling paraphernalia seized from the apartment. After first being qualified as an expert on gambling the government witness identified, interpreted and explained to the jury the various exhibits and in the course of his testimony offered his opinion that these exhibits were used in the recording of wagers. Appellant contends this testimony usurped a duty of the jury.

An examination of the record indicates that gambling in the form practiced herein is a complex business using markers, codes and symbols. It is an area, we believe, little understood by, if not completely unintelligible to, the average juror. We believe explanation and interpretation of these exhibits to the jury is almost an absolute necessity if they are to reach an enlightened verdict. As such, we believe this is a proper area in which expertise may be exercised, and a properly qualified expert may offer his opinion on relevant matters concerning the operation of a gambling enterprise. *United States v. Altieri*; 343 F. 2d 115, 119 (7 Cir. 1965), vacated on other grounds 382 U. S. 367; *State v. Saussele*, 265 S. W. 2d 290, 296 (Mo. 1954).

While appellant admits that evidence of criminal acts other than the one charged may be introduced to show intent or other element of the charged offense (See, *United States v. Compton*, 355 F. 2d 872 (6 Cir. 1966), cert. denied 384 U. S. 951) he contends that evidence of gambling which took place at a different location in St. Louis some seven months earlier is too remote to be admissible. We disagree.

Two important elements of the charged crime are travel with the necessary intent and the existence of an illegal gambling "business enterprise". The prior connection of appellant to gambling activity conducted elsewhere tends to prove the lack of innocent purpose in his present venture. It further tends to prove that he was involved in a continuing "business enterprise" rather than a single incident of gambling.

The remoteness of the time and place are primarily matters going to the weight rather than the admissibility of the evidence. Only if the remoteness destroys the probative worth of the evidence, need it be rejected, and this is a matter left to the discretion of the trial court. *King v. United States*, 144 F. 2d 729 (8 Cir. 1944), cert. denied 324 U. S. 854. We do not believe we can say as a matter of law that the passage of seven months places the prior activity at a time so remote that it destroys the probative value of the evidence to a degree that the trial court abused its discretion in admitting it. See, *Medrano v. United States*, 285 F. 2d 23 (9 Cir. 1960), cert. denied 366 U. S. 968.

INSTRUCTION

Among other things § 563.360 of Missouri Revised Statutes, 1959 provides: "... * [A]ny person who in this state records or registers a bet or wager or sells pools

upon the results of any trial or contest . . . shall, on conviction, be adjudged guilty of a felony . . . ”

The Court instructed the jury as follows:

“If you, the jury, find and believe from the evidence and beyond a reasonable doubt that the defendant did *engage in accepting wagers on athletic contests and in furnishing odds or point spreads on athletic contests as a business enterprise*, then I instruct you that such activity violates the law of Missouri, as set out in Section 563.360 of the Missouri Revised Statutes of 1959.”

Appellant alleges that this instruction is erroneous in that the Missouri law does not declare to be illegal “the furnishing of odds and point spreads on athletic contests.”

The statute does forbid the registering of bets and the selling of pools, and the instruction on “accepting wagers” correctly related the law of Missouri on this point. Further, a necessary included part of “accepting wagers” might well be the furnishing of odds and point spreads. Though not specifically forbidden by the wording of the statute this is but a facet and part of the broader prohibition against gambling.

Furthermore, the language appellant finds objectionable required the government to prove not only the acceptance of wagers, as this was all that was necessary to prove a state law violation, but required the government to prove that appellant had furnished odds and point spreads. Rather than expanding the statute as appellant charges, the government was required to assume an unnecessary burden of proof, which was mere surplusage that inured to the benefit of appellant.

SUFFICIENCY OF THE EVIDENCE

In determining sufficiency of evidence to support a verdict of guilty, the evidence must be viewed in a light most favorable to the government. We believe the evidence so viewed validly supports appellant's conviction.

There are three basic elements to the federal crime charged:

1. Interstate travel;
2. Intent (to promote, direct, or manage illegal business);
3. Overt act (in attempting or participating in the illegal business).

Appellant admits the sufficiency of the evidence of his interstate travel, but contests the sufficiency of the evidence indicating intent at the time of travel or the overt act following the travel.

To prove intent the government properly introduced evidence of appellant's involvement in a prior gambling operation which took place some seven months before the offense charged herein. The evidence of the present violation indicates that appellant periodically visited this apartment, and it indicates that gambling operations were obviously taking place therein. Though there is some evidence that appellant came into Missouri to visit his broker, certainly there is sufficient evidence allowing the jury to infer that the purpose of the trip was motivated by the gambling operation. This was an issue of fact resolved by the jury against appellant and it will not be disturbed by us.

Proof of the overt act is indicated by inference from proof of appellant's numerous visits to this apartment

and proof that this apartment was the scene of recent and comprehensive gambling activities. On the day of his arrest appellant had a key to the door of this apartment and was in the room alone with this gambling paraphernalia for well over two hours. This evidence would certainly allow the jury to infer that after crossing into Missouri with the requisite intent, appellant attempted or committed acts in the promotion, management, establishment or carrying on of gambling activity in violation of Missouri law. All that needs to be proved is some overt act directed to the illegal gambling activity. It is not necessary that appellant actually be witnessed placing or receiving a wager. The evidence supports the conviction.

Judgment affirmed.

Heaney, Circuit Judge, with whom Van Oosterhout, Circuit Judge, concurs, dissenting:

We respectfully dissent. In our opinion, the decisions of the United States Supreme Court in *Riggan v. Virginia*, 384 U. S. 152 (1966), *United States v. Ventresca*, 380 U. S. 102 (1965) and *Aguilar v. Texas*, 378 U. S. 108 (1964), and the decision of this Court in *Gillespie v. United States*, 368 F. 2d 1 (8th Cir. 1966), require a reversal of the District Court as the affidavit submitted in support of the search warrant did not provide a substantial basis for its issuance.

The majority opinion concedes that the "visits" to the apartment, the presence of the two telephones in the searched apartment, and the affiant's personal knowledge that the defendant was a known gambler are at the most, *established suspicions*. As such, they are not sufficient to constitute probable cause for the issuance of a search warrant. *Locke v. United States*, 7 Cranch. 339 (1819); See *Pigg v. United States*, 307 F. 2d 302, 305 (8th Cir.

1964); *Cochran v. United States*, 291 F. 2d 633, 636 (8th Cir. 1961).

It argues, however, that the "suspicions" were ripened into probable cause by the affiant's statement that the F. B. I. had been informed by an unidentified reliable informant that Spinelli is "operating a handbook and accepting wagers and disseminating wagering information" by means of the two telephones assigned numbers WY-down 4-0029 and WYdown 4-0136.

Conversely, it argues that the "suspicions" served to corroborate the conclusions of the unidentified informant and establish his reliability.

We cannot agree with either contention.

The Fourth Amendment's right¹ of the people to be secured against the unreasonable searches of their persons, houses,² papers, and effects, *Mapp v. Ohio*, 367 U. S. 643 (1961); *Weeks v. United States*, 232 U. S. 383, 392 (1914), extends to the guilty as well as the innocent. *McDonald v. United States*, 335 U. S. 451, 453 (1948); *Hobson v. United States*, 226 F. 2d 890, 892 (8th Cir. 1955).

¹ The Fourth Amendment reads:

"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The policy expressed in this amendment finds expression in Rule 41 of the Federal Rules of Criminal Procedure.

² The Supreme Court has refused to uphold otherwise unreasonable criminal searches merely because commercial, rather than residential, premises were the object of the police intrusions. *See v. City of Seattle*, ... U. S. ..., 18 L. Ed. 2d 943 (1967); *Go-Bart Importing Co. v. United States*, 282 U. S. 344 (1931); *Amos v. United States*, 255 U. S. 313 (1921); *Silverthorne Lumber Co. v. United States*, 251 U. S. 385 (1920).

While the use of search warrants is to be encouraged, *United States v. Ventresca, supra*, a magistrate must perform his duties neutrally; he "must not serve as a rubber stamp for the police." *Id.* at 109; *Aguilar v. Texas, supra* at 111; *Giordenello v. United States*, 357 U. S. 480, 486 (1958); *Johnson v. United States*, 333 U. S. 10, 14 (1948).

"... It is not the magistrate's function, therefore, merely to determine whether the official seeking the warrant believes that probable cause exists; rather, the magistrate must ask whether the facts presented persuade him that there is probable cause. . . ."

Rogers v. Warden, No. 30874, 2d Cir., June 15, 1967, pp. 2504-2505.

A proceeding by search warrant is a drastic one, *Sgro v. United States*, 287 U. S. 206, 210 (1932), and must be carefully circumscribed. *Boyd v. United States*, 116 U. S. 616 (1886).

With these general principles in mind, we consider whether the magistrate here had probable cause to issue a warrant to search Apartment F of the Chieftain Manor Apartments.

As the only information before the magistrate when he issued the search warrant was that set forth in the affidavit, the sufficiency of the affidavit must be determined from its face. *Aguilar v. Texas, supra* at 109, n. 1; *Giordenello v. United States, supra*.

While hearsay may be the basis for the issuance of a search warrant, *Jones v. United States*, 362 U. S. 257, 272 (1960), if it is relied upon to establish probable cause, the magistrate must be informed of some of the underlying circumstances supporting the affiant's conclusions, and his belief that any informant involved was credible or his information reliable. *United States v. Ventresca, supra*; *Rugendorf v. United States*, 376 U. S. 528 (1964); *Gillespie*

v. United States, supra. See Annot. 10 A. L. R. 3d 359 (1966).

Applying the standards set forth in *Ventresca*, *Rugen-dorf* and *Gillespie* to the informant's statement in the present case, it is clear that it was not sufficient to justify a finding of probable cause by the magistrate. The affidavit in which it was contained:

(1) Failed to set forth any basis upon which the magistrate could form an independent opinion of the informant's reliability, or on which he could find that the informant had furnished information in the past which had proved to be reliable.

In *McCray v. Illinois*, 18 L. Ed. 2d 62 (1967), where the Supreme Court found the informant to be reliable, the informant had furnished information to police officers forty or more times, which information had proved to be reliable in the past and had resulted in conviction.

And, in *Rogers v. Warden, supra, rev'd on other grounds*, the Second Circuit found the unidentified informant to be reliable on the basis that the affidavit indicated that he had furnished information in the past which had resulted in three convictions. Compare *United States v. Robinson*, 325 F. 2d 391 (2d Cir. 1963); and *Cochran v. United States, supra*, where the reliability of an informer was held not to have been established.

In *Cochran*, Chief Judge Vogel, writing for this Court, declared:

" . . . An uncorroborated tip by an informer whose identity and reliability are both unknown does not constitute probable cause to make an arrest." *Contee v. United States*, 1954 [94 U. S. App. D. C. 297], 215 F. 2d 324, 327." *Id.* at 636.

The affidavit in the present case contained only a simple allegation that the unidentified informant was reliable. There was nothing in it from which the magistrate could have determined that the informant had furnished reliable information in the past, nor were any facts set forth from which such an inference could be drawn. *United States v. Follette*, 267 F. Supp. 337, 342 (S. D. N. Y. 1967); See *State ex rel. Dunn v. Tahash*, 147 N. W. 2d 382 (1966).

(2) Failed to (a) indicate whether the informant spoke on the basis of his personal knowledge, or (b) to outline any of the underlying circumstances upon which the unidentified informant based his statement that illegal activity was taking place on the premises searched.

(a) In *Riggan v. Virginia*, *supra*; *Aguilar v. Texas*, *supra* at 109; and *Gillespie v. United States*, *supra* at 3, the informant's statements were substantially the same as the one here.⁸ In *Aguilar*, the Court, in pointing out that the affidavit failed to indicate whether the informant spoke from his own personal knowledge, stated:

"The vice in the present affidavit is at least as great as in *Nathanson* and *Giordenello*. Here the 'mere conclusion' that petitioner possessed narcotics was not even that of the affiant himself; it was that of an unidentified informant. The affidavit here not only 'contains no affirmative' allegation that the affiant spoke with personal knowledge of the matters contained therein,' it does not even contain an 'affirmative allegation' that the affiant's unidentified source

⁸ In *Aguilar v. Texas*, 378 U. S. 108 (1964), the affidavit in relevant part read:

"Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law."

'spoke with personal knowledge.' For all that appears, the source here merely suspected, believed or concluded that there were narcotics in petitioner's possession. The magistrate here certainly could not 'judge for himself the persuasiveness of the facts relied on . . . to show probable cause.' He necessarily accepted 'without question' the informant's 'suspicion,' 'belief' or 'mere conclusion.' " *Id.* at 113-14.⁴

(b) The same Court, in laying down the need for the magistrate to be informed of some of the underlying circumstances supporting the informant's conclusions, stated:

" . . . the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see *Rugendorf v. United States*, 376 U. S. 528, 11 L. Ed. 2d 887, 84 S. Ct. 825, was 'credible' or his information 'reliable.' Otherwise, 'the inferences from the facts which lead to the complaint' will be drawn not 'by a neutral and detached magistrate,' as the Constitution requires, but instead, by a police officer 'engaged in the often competitive enterprise of ferreting out crime,' *Giordenello v. United States*, supra, 357 U. S. at 486, 2 L. Ed. 2d at 1509; *Johnson v. United States*, supra, 333 U. S. at 14, 92 L. Ed. at 440, or, as in this case, by an unidentified informant." *Id.* at 114-15.

In *United States v. Ventresca*, *supra*, where the Court found that the underlying circumstances had been ade-

⁴ The majority opinion urges that the informant's statement to the affiant that Spinelli was "operating a handbook and accepting wagers and disseminating wagering information by means of the telephones (numbered) WYdown 4-0029 and WYdown 4-0136," was a statement of fact and not a conclusion. We believe it to be a statement similar to that in the *Aguilar* affidavit which the Supreme Court referred to as a conclusion.

quately set forth, the affidavit stated that the informants, unidentified Revenue Agents, had smelled fermenting mash outside the premises searched on August 18th and 30th; saw bags of sugar being delivered to the premises on July 28th, August 2nd, 7th and 16th; and observed tin cans being taken to and from the premises on August 11th, 16th, 24th and 28th. The Court cautioned:

"This is not to say that probable cause can be made out of affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists without detailing any of the 'underlying circumstances' upon which that belief is based. See *Aguilar v. Texas*, *supra*. Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police. . . ." *Id.* at 108-109.

See *United States v. Conti*, 361 F. 2d 153 (2d Cir. 1966) (where the affiant personally placed bets with the defendant).

(3) Failed to indicate when the informant became aware of the fact that illegal activities were taking place in the apartment, or when the informant gave this information to the affiant. The fact that the affidavit and the informant's statement was couched in the present tense does not satisfy this requirement. See *Sgro v. United States*, *supra*, at 210-211; *Schoeneman v. United States*, 317 F. 2d 173 (D. C. Cir. 1963).

In *Rosencranz v. United States*, 356 F. 2d 310 (1st Cir. 1966), the leading case on the issue of time, the affidavit for the search warrant read insofar as material as follows:

".... he has reason to believe that on the premises . . . there is now being concealed certain property,

namely mash fit for distillation, apparatus for the purpose of distillation and nontax paid alcohol which are held in violation of Title 26, U. S. C. Sec. 5601, (a), (1), (6), (7), (8), (12):

"And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

"1. Information given anonymously to the Affiant that the aforementioned materials are being held on said premises.

"2. The detection of a strong odor of mash outside the premises by the Affiant." *Id.* at 312, n. 1. (Emphasis added.)

The Court there held that the affidavit was not sufficient to establish probable cause because it did not contain an averment as to the time when the affiant received information from his anonymous informant, or the time when the affiant detected the odor of the mash. It stated that the use of the present tense was not sufficient. The Court, after making a detailed examination of the cases dealing with this question, stated:

". . . The present tense is suspended in the air; it has no point of reference. It speaks, after all, of the time when an anonymous informant conveyed information to the officer, which could have been a day, a week, or months before the date of the affidavit. To make a double inference, that the undated information speaks as of a date close to that of the affidavit and that therefore the undated observation made on the strength of such information must speak as of an even more recent date would be to open the door to the unsupervised issuance of search warrants on the basis of aging information. . . . Indeed, if the affidavit in this case be adjudged valid, it is

difficult to see how any function but that of a rubber stamp remains for them.

“ . . . It is one thing to expect the magistrate to give a commonsense reading to facts set forth and to draw inferences from them. It is quite another thing to expect the magistrate to reach for external facts and to build inference upon inference in order to create a reasonable basis for his belief that a crime is presently being committed.” *Id.* at 316-17.

In the present case, although the affiant's statement indicates when he saw Spinelli traveling from Illinois to Missouri, and when he observed him visiting the apartment complex and the apartment, it is silent as to when the affiant learned from the informant that Spinelli was using the phones in Apartment F for illegal activities, or when such activity took place. Just as the *Rosencrancz* Court stated that it could not infer from the date of the affidavit that the information had been passed at or near that date,⁶ we cannot infer from this affidavit that the anonymous information was transmitted to the affiant at or near the date the warrant was requested, nor can we infer that the informant's “knowledge that the two phones were being used by Spinelli” was correct. Thus, the informant's statement here, as in *Rosencrancz*, is “suspended in the air.”

In summary, we do not believe that the unidentified informant's statement to the affiant can be used for any

⁶ Judge Coffin asks a pertinent question in *Rosencrancz*:

“ . . . But suppose a commissioner, on the basis of an affidavit . . . were to infer that both affiant's information and observation were recent, while at a hearing on a motion to suppress, affiant states that both information and observation were several months old. There would, in fact, have been no basis for issuing the warrant, and yet the affidavit would have been accurate and the affiant would be in no danger of prosecution for its falsity. . . . ” *Id.* at 317.

purpose. Not only did the affidavit fail to establish the reliability of the informer, but there was no showing that the informer spoke from his own personal knowledge. None of the underlying circumstances supporting the informer's belief were set forth, and the affidavit failed to indicate when he received or passed on the information that Spinelli was conducting gambling activities over the two phones in question. While we do not agree with the majority that the informant's reliability was established by his knowledge of the existence of the phone numbers in the apartment searched, even if this view is accepted, the informant's statement is totally unacceptable for the other stated reasons.*

Nor do we believe that the facts stated in the affidavit, obtained by the affiant through surveillance, rise above the level of suspicion whether considered with or without the informant's conclusion.

(1) Interstate travel between East St. Louis, Illinois, and St. Louis, Missouri, is surely so common that it can-

* The majority opinion cites *Jones v. United States*, 362 U. S. 257 (1960); *Rosencrans v. United States*, 356 F. 2d 310 (1st Cir. 1966; and *Hodgdon v. United States*, 365 F. 2d 697 (8th Cir. 1966), in support of the proposition that the hearsay information obtained from the unidentified informant had been sufficiently corroborated here to establish probable cause. A reading of these cases indicates that in each case, either the informant or the affiant had personally observed illegal activities in or near the premises to be searched.

Thus, in *Jones*, the informant stated that he had purchased narcotics from the defendant in the defendant's apartment on a number of occasions, the most recent one being a day prior to the issuance of the search warrant. He detailed precisely where in the apartment the narcotics were kept.

In *Rosencrans* (reversed on other grounds), the informant's conclusory statement, that the defendant was operating a still, was corroborated by the personal observations of the affiant (a law enforcement agent) who smelled the strong odor of mash outside of the premises of the appellant.

And in *Hodgdon*, the informant (a U. S. Court Commissioner) told the affiant (a law enforcement officer) that he had been threatened with a gun the previous day by the defendant while alone in his office with the defendant.

not be viewed as establishing an unusual pattern of travel from which illegality can be inferred. Compare *Travis v. United States*, 262 F. 2d 477 (9th Cir. 1966) (defendant established a definite pattern or *modus operandi*); and *Hernandez v. United States*, 353 F. 2d 624 (9th Cir. 1965).⁷

(2) Four observed visits to the apartment complex and one such visit to Apartment F, absent *any* showing of activity indicating that bookmaking activities were taking place in the apartment, does not, in our judgment, add support for a probable cause finding.

The Second Circuit, in *Rogers v. Warden*, *supra* (reviewing a petition for habeas corpus), effectively overruled a decision of the New York Court of Appeals where the facts indicated that a police officer had personally observed four known addicts and nine other persons entering or leaving the premises searched over a two-day

⁷ A large number of facts coalesced in *Hernandez v. United States*, 353 F. 2d 624 (1965), to form probable cause for the arrest and search of the defendant's bags. Los Angeles police had observed a recurring pattern in incidents involving illicit transportation of marihuana. Large lots were being brought to Los Angeles from Mexico by auto, then carried from Los Angeles to New York City in the luggage of persons traveling on commercial air flights. It was established that the couriers (1) were Latin Americans, (2) traveled first class, (3) traveled on non-stop flights, (4) made no advance reservations, (5) carried new and expensive luggage, (6) carried luggage which usually bore the brand name "Ventura," (7) carried luggage which usually had combination locks, (8) carried luggage which was exceedingly heavy because of the weight of the marihuana, and (9) paid their fares and weight overcharges in cash with bills in large denominations. Eight such cases had been investigated in the two years preceding the appellant's apprehension. Airport employees were asked to notify the police if a person fitting the described pattern appeared. The appellant appeared, was arrested, his bags searched, and a large quantity of marihuana was uncovered. In commenting on the search and seizure, the Court, at 628, stated:

"... The circumstances upon which Sergeant Butler relied were within his knowledge *before* the search was initiated, and were sufficient to justify a reasonable man in believing that the very bags which he did search contained marihuana."

period; even though the affidavit, as here, stated that the affiant had received information from an informant, known to be reliable, that the defendant, and others were selling narcotics in the first floor and basement apartment.⁸ The Court, in holding that the warrant failed to establish probable cause, stated:

" . . . there is not a hint in the present affidavit that the informant had seen any trafficking in narcotics taking place in Rogers' apartment. It is difficult for us to understand, therefore, the basis for the inference drawn by the Appellate Division and the New York Court of Appeals that the informant spoke of what he had seen, for the 'deficiencies [in the affidavit] could not be cured by the . . . reliance upon a presumption that the complaint was made

⁸ The affidavit in *Rogers v. Warden*, No. 30,874, 2d Cir. June 15, 1967, p. 2495, n. 1, read in part:

"1. I am a detective assigned to the Brooklyn District Attorney's Off.

"2. I have information based upon confidential information received from an an. [sic] informant known to be reliable and accurate [sic] and whose information in the past has led to the arrest and conviction of three persons. The information is that Jimmy Rogers and other persons found in said apartment are selling narcotic drugs in the 1st fl. & basement apartment of premises 191 Quincy St., Brooklyn, N. Y. Observations by the deponent of the premises on Thursday, January 10, 1963, between the hours of 8:00 and 9:00 P. M. five unknown males and two known male addicts were seen entering the premises; on January 11th, 1963, from 9:00 to 11:00 A. M. four unknown males and two known male addicts.

"By reason of the aforesaid the deponent has probable cause to believe that narcotic drugs and paraphernalia commonly used by drug sellers and addicts may be found at the aforesaid premises and upon the persons found therein.

"3. Based upon the foregoing reliable information and upon my personal knowledge there is probable cause to believe that such property, to wit, narcotic drugs and paraphernalia commonly used by drug addicts and sellers and [sic] may be found in the possession of Jimmy Rogers and upon the persons found therein or at premises first floor and basement of 191 Quincy Street, Brooklyn, N. Y."

on the personal knowledge of the [informant].'" "
Id. at 2509.

• • • • •
"Since it is apparent that Rogers lived in an 'apartment' building, it is obscure, vague and at the very least equivocal whether Gowski actually observed the unknown males and known addicts entering Rogers' 'apartment,' or whether he merely saw them entering the 'premises,' . . ." *Id.* at 2511.
• • • • •

"It can be argued, of course, that when Gowski stated that he had observed the 'premises,' he was really talking about the 'apartment.' We recognize that affidavits are often hastily drawn and that we cannot expect a police officer to draft an affidavit with the skill and precision of a lawyer. . . . Nevertheless, the simple fact remains that from the affidavit before us, neither we nor the magistrate who issued the warrant could be reasonably certain what it was that the officers observed, and there is nothing to indicate that the magistrate attempted to make any inquiries to resolve the ambiguity that existed. . . ." *Id.* at 2513.

The issuance of a search warrant must be based on more specific evidence than was provided in the present instance. As we stated earlier, in *United States v. Ventresca, supra*, government agents *smelled* the odor of fermenting mash in the vicinity of the suspected dwelling, and *observed* other activities suggesting the operation of a still. In *Miller v. Sigler*, 353 F. 2d 424, 426-7 (8th Cir. 1965), the affiant *smelled* the odor of marihuana outside the premises searched on a number of occasions. In *Biondo v. United States*, 348 F. 2d 272-3 (8th Cir. 1965), the defendant was *observed* carrying racing forms into the apartment. In *United States v. Pinkerman*, 374 F. 2d

988, 990 (4th Cir. 1967), the affiant saw barrels and smelled mash outside the premises. In *United States v. Ramirez*, 279 F. 2d 712-15 (2d Cir. 1960), the affiant personally saw quantities of white powder he believed to be heroin in the apartment to be searched two days before the warrant was issued. In *United States v. Rugendorf*, *supra*, a reliable informant told the affiant he saw furs, alleged to have been stolen, in the defendant's basement a few days before the search.⁹

(3) The fact that two telephones were located in the vested apartment does not, in this day and age, in the absence of some specific evidence of how the phones were used or the presence of unusual equipment, constitute probable cause for the issuance of a search warrant. *United States v. Gebell*, 209 F. Supp. 11 (E. D. Mich. 1962). See *United States v. Menser*, 360 F. 2d 199, 203 (2d Cir. 1966); *United States v. Nicholson*, 303 F. 2d 330 (6th

* In *United States v. Jordan*, 349 F. 2d 107 (6th Cir. 1965), the officers observed the transfer of jugs and smelled the odor of mash emanating from the premises. In *United States v. Freeman*, 358 F. 2d 459 (2d Cir. 1966), the heroin was seen within the premises to be searched by the informant. In *United States v. Grosso*, 358 F. 2d 154 (3rd Cir. 1966), known numbers operators were observed depositing envelopes and brown paper bags in a car near a cemetery. In *Irby v. United States*, 314 F. 2d 251 (D. C. Cir. 1963), the affiant observed the government's special employee taking money from known addicts and the employee turned over narcotics obtained with the money prior to the issuance of a warrant. In *United States v. Gorman*, 208 F. Supp. 747 (E. D. Mich. 1962), several others engaged in handbook activities were seen entering the apartment alone or with the defendant. In *United States v. Whiting*, 311 F. 2d 191 (4th Cir. 1962), a convicted gambler was observed making contact with the defendant under suspicious circumstances by the affiant. In *United States v. Suarez*, No. 30,883, 2d Cir., July 12, 1967, the affidavit related that the reliable informant had provided information on at least 100 occasions over the past one and one-half years and had observed heroin in the apartment to be searched. See *United States v. Ramos*, No. 31239, 2d Cir., July 12, 1967, and *United States v. Perry*, No. 30,620, 2d Cir., July 12, 1967, where the affidavit contained information comparable to that in *United States v. Suarez*, *supra*.

Cir. 1962), compare *United States v. Gorman*, 208 F. Supp. 747-48 (E. D. Mich. 1962), where numerous long distance telephone calls with known bookmakers were consummated over the phones in question; *Biondo v. United States*, *supra* at 274, where unusual telephonic equipment was in use; and, *United States v. Conti*, *supra*, where the affiant placed bets by making a phone call to the apartment searched.

(4) The fact that the appellant was known to the affiant and other law enforcement agents as a bookmaker, and an associate of bookmakers, would, if supported by some credible evidence, be a factor which a magistrate might consider, *Jones v. United States*, *supra* at 271, but here, we have no such supporting evidence.

The majority relies heavily on *McCray v. Illinois*, *supra*; and *Draper v. United States*, 358 U. S. 307 (1959), in support of its opinion. We believe that these cases do not support a finding of probable cause here; rather, we feel that they suggest a contrary result.

At the outset, we point out that *Draper* was followed by *Aguilar v. Texas*, *supra*; *Beck v. Ohio*, 379 U. S. 89 (1964); *United States v. Ventresca*, *supra*; and most recently by *McCray v. Illinois*, *supra*. Thus, *Draper* must be read in light of these subsequent cases. There are several factors which distinguish *Draper* from the present case:

(1) In *Draper*, the informant was a *named* special employee of the federal narcotics agents;¹⁰ here, the informant was unidentified.

¹⁰ Justice Goldberg, speaking in *United States v. Ventresca*, 380 U. S. 102, 111 (1965), stated:

". . . Observations of fellow officers of the Government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number. . . ."

(2) In *Draper*, the informant had given reliable information to the federal agents on numerous occasions over a six-month period, and the information had *always* been found to be reliable. Here, we have a mere allegation of reliability.

(3) In *Draper*, the informant told the arresting officer, on September 3rd, that the defendant had taken up residence in the city, and was peddling narcotics to several residents of the city. Four days later, the informant told the arresting officer that the defendant had gone to Chicago the day before and that he would bring back three ounces of heroin; and that he would return on the morning of September 8th or 9th. He described in exact detail the defendant's dress and baggage.

Here, the informant gave no information as to when Spinelli had used the telephones for illegal purposes, or when they would be so used in the future, nor does the affidavit indicate when the informant told the F. B. I. Agent that Spinelli "is using the phones for gambling."

(4) Finally, the information supplied by the informant in *Draper* is so precise that it obviously came from one intimately familiar with the defendant's activities; while here, the information from the informant regarding the phone numbers in Apartment F is of such a general nature that it could have been obtained from any one of a number of sources, including the phone book, or another unidentified informant.

Five years after *Draper*, Justice Stewart, speaking for the Court in *Beck v. Ohio*, *supra*, where it refused to find probable cause, focused on the essential elements in *Draper* which caused the Court to find probable cause for the arrest. Justice Stewart declared:

". . . But in that case the record showed that a named special employee of narcotics agents who had

on numerous occasions given reliable information had told the arresting officer that the defendant, whom he described minutely, had taken up residence at a stated address and was selling narcotics to addicts in Denver. The informant further had told the officer that the defendant was going to Chicago to obtain narcotics and would be returning to Denver on one of two trains from Chicago, which event in fact took place. . . ." *Id.* at 95.

In *Beck*, the arresting officer had a police photo of the suspect, knew what the suspect looked like, knew that the petitioner had a record in connection with clearing house schemes and schemes of chance, and had received information regarding the suspect's activities from an undisclosed source. In reversing the conviction, the Court said:

" . . . But the officer testified to nothing that would indicate that any informer had said that the petitioner could be found at that time and place. Cf. *Draper v. United States*, 358 U. S. 307, 3 L. ed. 2d 327, 79 S. Ct. 329. And the record does not show that the officers saw the petitioner 'stop' before they arrested him, or that they *saw, heard, smelled or otherwise perceived anything else* to give them ground for belief that the petitioner had acted or was then acting unlawfully." *Id.* at 94. (Emphasis added.)

* * * * *

" . . . All that the trial court was told in this case was that the officers knew what the petitioner looked like and knew that he had a previous record of arrests or convictions for violations of the clearing house law. Beyond that, the arresting officer who testified said no more than that someone (he did not say who) had told him something (he did not say what) about the petitioner." *Id.* at 96-97.

Beck was followed by *McCray*, where the Supreme Court also found probable cause. In doing so, it noted that the unidentified informant had given information to the police on at least forty prior occasions; the information had resulted in a number of convictions; the informant personally observed the defendant selling narcotics and immediately informed the police, who proceeded forthwith to where the affiant had seen the defendant, and after observing the defendant, arrested him.

When *Draper*, *Beck* and *McCray* (all non-warrant cases) are considered together, they indicate that the Supreme Court will find probable cause where the informant is shown to be reliable, the information furnished by him is precise as to time and place, and is either based on the informant's personal knowledge or is so specific as to indicate that the informant is intimately familiar with the defendant's operations, and the police have acted promptly upon receiving the informant's tip.

Here, there is no showing that the unidentified informant had submitted reliable information to the police in the past. The information furnished by him was conclusory in nature, and it does not appear that it was based on his personal knowledge. And, finally, the affidavit does not indicate whether the police acted promptly on receipt of the information from him.

CONCLUSION.

We share the feelings of our colleagues that affidavits presented to a magistrate, to establish probable cause for the issuance of a search warrant, must be viewed in a commonsense matter.

When we read the affidavit here, at least three commonsense questions occur to us. We feel the same questions ought to have occurred to the magistrate:

- (1) How did the affiant know that the informant was reliable?
- (2) How did the affiant know that Spinelli was using the two telephones to conduct his operations in Apartment F?
- (3) When did the informant obtain this information, and when did he transmit it to the affiant?

We cannot believe that we are being hypertechnical by insisting that these basic questions be answered.

It is important that the use of search warrants be encouraged. It is equally important that magistrates satisfy themselves that there is reasonable cause for believing that illegal activity is taking place on the premises to be searched before issuing search warrants.

We concur with the majority that the defendant had standing; but as it is our belief that probable cause did not exist for the issuance of the search warrant and as this determination is dispositive of the case, we express no opinion on the other issues raised by the appellant.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX C.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES OF COURT INVOLVED.

Amendments to Constitution of the United States:

I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

V.

. . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . .

VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the

witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Statutes of the United States.

18 U. S. Code, § 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises.

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than \$10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means

(1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

18 U. S. Code, § 3731. Appeal by United States.

An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.

From a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court of the United States is provided by this section.

The appeal in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted.

Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be admitted to bail on his own recognizance.

If an appeal shall be taken, pursuant to this section, to the Supreme Court of the United States which, in the opinion of that Court, should have been taken to a court of appeals, the Supreme Court shall remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal had been taken to that court in the first instance.

If an appeal shall be taken pursuant to this section to any court of appeals, which, in the opinion of such court, should have been taken directly to the Supreme Court of the United States, such court shall certify the case to the Supreme Court of the United States, which shall thereupon have jurisdiction to hear and determine the case to the same extent as if an appeal had been taken directly to that Court.

Statutes of State of Missouri.

Revised Statutes of Missouri, 1959, § 563.360. Bookmaking and pool selling occupying room, penalty.

Any person who occupies any room, shed, tenement, tent, booth, building or enclosure, or any part thereof, in this state, with any book, sheet, blackboard, instrument or device or substance for the purpose of recording or registering bets or wagers or selling any pools upon the result of any trial or contest of skill, speed or power of endurance of man or beast, which is to be made or to take place within or without this state; or any person who occupies any room, shed, tenement, tent, booth, building or enclosure, or any part thereof, in this state with any telephone or telegraph instrument, or any apparatus or device of any kind whatsoever, for the purpose of communicating information to any place in this or any other state, for the purpose of there recording or registering bets or wagers or selling pools upon the result of any trial or contest of skill, speed or power of endurance

of man or beast, which is to be made or to take place within or without this state, or any person who in this state records or registers a bet or wager or sells pools upon the result of any trial or contest of skill, speed or power of endurance of man or beast, which is to be made or to take place within or without this state, or any person who becomes the custodian or depositary of any money, bet or wager or to be bet or wagered, upon any trial or contest of skill, speed or power of endurance of man or beast which is to be made or take place within or without this state, or any person who, being the owner, lessee, occupant or person in charge of any room, tenement, shed, tent, booth, building, or enclosure, or any part thereof, within this state, knowingly permits the same to be used or occupied for any of the purposes herein set forth, shall, on conviction, be adjudged guilty of a felony, and shall be punished by imprisonment in the penitentiary for a term of not less than two years nor more than five years, or by imprisonment in the county jail for a term of not more than one year, or by a fine of not more than one thousand dollars or by both such fine and imprisonment.

Rules of Court—Federal Rules of Criminal Procedure.

Rule 5. Proceedings before the Commissioner.

(c) **Preliminary Examination.** The defendant shall not be called upon to plead. If the defendant waives preliminary examination, the commissioner shall forthwith hold him to answer in the district court. If the defendant does not waive examination, the commissioner shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If from the evidence it appears to the commissioner that there is probable cause to believe that an offense has been committed and

that the defendant has committed it, the commissioner shall forthwith hold him to answer in the district court; otherwise the commissioner shall discharge him. The commissioner shall admit the defendant to bail as provided in these rules. After concluding the proceeding the commissioner shall transmit forthwith to the clerk of the district court all papers in the proceeding and any bail taken by him.

Rule 7. The Indictment and the Information.

(c) **Nature and Contents.** The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. . . .

Rule 14. Relief from Prejudicial Joinder.

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

Rule 41. Search and seizure.

(c) **Issuance and Contents.** A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and

the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned.

(d) **Execution and Return With Inventory.** The warrant may be executed and returned only within 10 days after its date. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The judge or commissioner shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(e) **Motion for Return of Property and to Suppress Evidence.** A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is

insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

APPENDIX D.

Affidavit in Support of Search Warrant.

I, Robert L. Bender, being duly sworn, depose and say that I am a Special Agent of the Federal Bureau of Investigation, and as such am authorized to make searches and seizures.

That on August 6, 1965, at approximately 11:44 a. m., William Spinelli was observed by an Agent of the Federal Bureau of Investigation driving a 1964 Ford convertible, Missouri license HC3-649, onto the Eastern approach of the Veterans Bridge leading from East St. Louis, Illinois, to St. Louis, Missouri.

That on August 11, 1965, at approximately 11:16 a. m., William Spinelli was observed by an Agent of the Federal Bureau of Investigation driving a 1964 Ford convertible, Missouri license HC3-649, onto the Eastern approach of the Eads Bridge leading from East St. Louis, Illinois, to St. Louis, Missouri.

Further, at approximately 11:18 a. m. on August 11, 1965, I observed William Spinelli driving the aforesaid Ford convertible from the Western approach of the Eads Bridge into St. Louis, Missouri.

Further, at approximately 4:40 p. m. on August 11, 1965, I observed the aforesaid Ford convertible, bearing Missouri license HC3-649, parked in a parking lot used by residents of The Chieftain Manor Apartments, approximately one block east of 1108 Indian Circle Drive.

On August 12, 1965, at approximately 12:07 p. m., William Spinelli was observed by an Agent of the Federal Bureau of Investigation driving the aforesaid 1964 Ford convertible onto the Eastern approach of the Veterans Bridge from East St. Louis, Illinois, in the direction of St. Louis, Missouri.

Further, on August 12, 1965, at approximately 3:46 p. m., I observed William Spinelli driving the aforesaid 1964 Ford convertible onto the parking lot used by the residents of The Chieftain Manor Apartments approximately one block east of 1108 Indian Circle Drive.

Further, on August 12, 1965, at approximately 3:49 p. m., William Spinelli was observed by an Agent of the Federal Bureau of Investigation entering the front entrance of the two-story apartment building located at 1108 Indian Circle Drive, this building being one of The Chieftain Manor Apartments.

On August 13, 1965, at approximately 11:08 a. m., William Spinelli was observed by an Agent of the Federal Bureau of Investigation driving the aforesaid Ford convertible onto the Eastern approach of the Eads Bridge from East St. Louis, Illinois, heading towards St. Louis, Missouri.

Further, on August 13, 1965, at approximately 11:11 a. m., I observed William Spinelli driving the aforesaid Ford convertible from the Western approach of the Eads Bridge into St. Louis, Missouri.

Further, on August 13, 1965, at approximately 3:45 p. m., I observed William Spinelli driving the aforesaid 1964 Ford convertible onto the parking area used by residents of The Chieftain Manor Apartments, said parking area being approximately one block from 1108 Indian Circle Drive.

Further, on August 13, 1965, at approximately 3:55 p. m., William Spinelli was observed by an Agent of the Federal Bureau of Investigation entering the corner apartment located on the second floor in the southwest corner, known as Apartment F, of the two-story apartment building known and numbered as 1108 Indian Circle Drive.

On August 16, 1965, at approximately 3:22 p. m., I observed William Spinelli driving the aforesaid Ford convertible onto the parking lot used by the residents of The Chieftain Manor Apartments approximately one block east of 1108 Indian Circle Drive.

Further, an Agent of the F. B. I. observed William Spinelli alight from the aforesaid Ford convertible and walk toward the apartment building located at 1108 Indian Circle Drive.

The records of the Southwestern Bell Telephone Company reflect that there are two telephones located in the southwest corner apartment on the second floor of the apartment building located at 1108 Indian Circle Drive under the name of Grace P. Hagen. The numbers listed in the Southwestern Bell Telephone Company records for the aforesaid telephones are WYdown 4-0029 and WYdown 4-0136.

William Spinelli is known to this affiant and to federal law enforcement agents and local law enforcement agents as a bookmaker, an associate of bookmakers, a gambler, and an associate of gamblers.

The Federal Bureau of Investigation has been informed by a confidential reliable informant that William Spinelli is operating a handbook and accepting wagers and disseminating wagering information by means of the telephones which have been assigned the numbers WYdown 4-0029 and WYdown 4-0136.

/s/ Robert L. Bender,
Robert L. Bender,
Special Agent Federal Bureau
of Investigation.

Subscribed and sworn to before me this 18th day of August, 1965, at St. Louis, Missouri.

/s/ William R. O'Toole.

APPENDIX E.

In the United States District Court,
Eastern District of Missouri,
Eastern Division.

United States of America,

Plaintiff,

vs.

William Spinelli,

Defendant.

} No. 65Cr 226 (1).

Order.

Defendant's separate motion to dismiss indictment, overruled in all particulars.

Separate motion of defendant to suppress indictment and for other appropriate relief, overruled in all particulars.

Defendant's separate motion for discovery and inspection, overruled without prejudice to refile after being furnished information by the District Attorney's office.

Separate motion for production of documentary evidence and objects, overruled without prejudice to refile after being furnished information by the District Attorney's office.

Defendant also has a motion before the court to require the United States to elect. The granting of such a motion is at the trial court's discretion (*Opper v. United States*, 344 U. S. 84, 94). The defendant has not shown that his slight inconvenience in preparing defenses to the various offenses chargeable under 18 USCA 1952 outweighs the greater prejudice to the government in being forced to limit its presentations to a restricted area of proof. In

view of the fact that the offenses chargeable under the above named section of the United States Code are so closely related in the particular elements constituting the offenses, the court feels that it will not work an undue hardship upon the defendant to prepare his defense. Accordingly, defendant's motion to require the United States to elect is overruled in all particulars.

Defendant also has a motion before the court to suppress evidence. In order to challenge the validity of a search, the movant must meet a certain minimum requirement of interest in the property seized. This interest must be such that the movant shows that he was at least legitimately upon the premises searched. The requirement for legitimate presence is the absolute minimum and was set out in *Jones v. United States*, 362 U. S. 257, 267. The defendant has failed to allege or show that such was the circumstance, and the defendant, therefore, lacks standing to protest the search. Accordingly, defendant's motion to suppress evidence is overruled.

/s/ Roy W. Harper,
U. S. District Judge.

January 20, 1966.

APPENDIX F.

In the United States District Court,
Eastern District of Missouri,
Eastern Division.

United States of America,

vs.

Plaintiff,

William Spinelli,

Defendant.

} No. 65 Cr 226 (1).

Order.

This matter is before the court on defendant's motion for a bill of particulars.

It Is Hereby Ordered that the government supply the defendant with a bill of particulars answering Paragraph 1 and that part of Paragraph 5 insofar as the location, dates and method of operation of the alleged business enterprise involving gambling is concerned. The motion is overruled in all other particulars.

The government will file said bill of particulars on or before January 24, 1966.

/s/ Roy W. Harper,
U. S. District Judge.

January 21, 1966.

APPENDIX G.

In the United States District Court,
Eastern District of Missouri,
Eastern Division.

United States of America,

Plaintiff,

vs.

William Spinelli,

Defendant.

} No. 65 Cr 226 (1).

Order.

Defendant's motion to strike the dates, July 22nd, July 23rd, and August 5th, from paragraph 1 of the bill of particulars, the first complete sentence and the first word "also" of the second sentence of paragraph 5 of the bill of particulars, and the words, "and 9745 Pauline Place", in the second line from the bottom of the last paragraph under paragraph 5, SUSTAINED, and stricken from the bill of particulars filed by the prosecution herein.

Defendant's motion to strike portions of bill of particulars and to require further particulars is overruled in all other respects.

/s/ Roy W. Harper,
U. S. District Judge.

March 8, 1966.

APPENDIX M.

Judgment.

**United States Court of Appeals
for the Eighth Circuit.**

No. 18,389.

September Term, 1966.

William Spinelli,
Appellant,
vs.

United States of America.

**Appeal From the United States District Court for the
Eastern District of Missouri.**

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered, and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, reversed.

And it is further Ordered by this Court that this cause be, and it is hereby, remanded to the said District Court for proceedings consistent with the majority opinion of this Court this day filed herein.

February 1, 1967.

Order entered in accordance with majority opinion:

/s/ Robert C. Tucker,
Clerk, U. S. Court of Appeals
For the Eighth Circuit.

APPENDIX L

United States Court of Appeals
for the Eighth Circuit.

No. 18389

September Term, 1966

William Spinelli,
Appellant,
vs.
United States of America.

} Appeal from the United
States District Court for
the Eastern District of
Missouri.

On consideration of appellee's motion for rehearing
en banc or, alternatively, for a rehearing, it is now here
ordered:

The petition for rehearing en banc is granted limited
to the issue of the validity of the search warrant and
the resulting search and seizure.

March 6, 1967.

APPENDIX J.

United States Court of Appeals
For the Eighth Circuit
St. Louis, Mo. 63101

March 13, 1967

Robert C. Tucker, Clerk

Mr. Irl B. Baris
Newmark and Baris
721 Olive Street
St. Louis, Missouri 63101

Hon. Richard D. FitzGibbon
United States Attorney
St. Louis, Missouri

Re: No. 18389. William Spinelli v. United States.

Dear Sirs:

Enclosed herewith please find copy of an order entered by us today at the direction of the Court.

In response to Mr. Baris' letter of March 9, the Court has directed me to inform counsel that it will permit argument on the points raised in appellant's original brief but not reached in the Court's opinion of February 1, 1967. The Court does not particularly want additional briefs on those issues but if counsel are aware of any new citations, they may be called to the attention of the Court.

Very truly yours,

/s/ Robert C. Tucker

Robert C. Tucker

Clerk

RCT:lp

Enc.

APPENDIX K.

United States Court of Appeals
For the Eighth Circuit
No. 18,389.

September Term, 1966.

William Spinelli,

vs.

United States of America.

Appellant,

Appeal from the
United States Dis-
trict Court for the
Eastern District of
Missouri.

This Court entered Order on March 6, 1967, granting a petition of appellee for rehearing en banc; and this cause was argued and submitted to the Court en banc on April 14, 1967.

After due consideration, it is now here Ordered by this Court that the former Opinion of the Court filed February 1, 1967, be and is hereby, withdrawn, and the Judgment entered on said Opinion be, and is hereby, stricken, set aside and held for naught.

July 31, 1967

APPENDIX I.

Judgment.

**United States Court of Appeals.
For the Eighth Circuit.**

No. 18,389.

September Term, 1966.

William Spinelli,

Appellant,

vs.

United States of America.

**Appeal from the
United States Dis-
trict Court for the
Eastern District of
Missouri.**

This cause came on to be heard by this Court; sitting en banc, on the original files of the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby affirmed, in accordance with the majority opinion of this Court this day filed herein.

And it is further Ordered by this Court that the defendant in the said District Court, William Spinelli, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after date of filing of the mandate in the District Court.

July 31, 1967.

Order entered in accordance with majority opinion:

/s/ Robert C. Tucker,
Clerk, U. S. Court of Appeals
For the Eighth Circuit.

APPENDIX M.

United States Court of Appeals.
For the Eighth Circuit.

No. 18,389.

William Spinelli,

Appellant,

vs.

United States of America.

Appeal from the
United States Dis-
trict Court for the
Eastern District of
Missouri.

Petition of appellant for rehearing filed in this cause
having been considered, it is now here ordered by this
Court that the same be, and it is hereby, denied.

September 12, 1967.



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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 801

WILLIAM SPINELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions of the court of appeals on rehearing *en banc* (Pet. App. A-21—A-77) are reported at 382 F. 2d 871. The initial opinions of the court of appeals (Pet. App. A-1—A-20) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 1967. A petition for rehearing was denied on September 12, 1967. Mr. Justice White ex-

tended the time for filing a petition for a writ of certiorari to November 11, 1967, and on November 8, 1967 the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government is precluded from obtaining a rehearing *en banc* of a decision of a panel of a court of appeals reversing a criminal conviction on a finding of lack of probable cause for a search warrant.
2. Whether, in the circumstances, the search warrant was properly issued and executed.
3. Whether petitioner was entitled to a preliminary hearing notwithstanding the return of an indictment.
4. Whether the indictment against petitioner was constitutionally defective.
5. Whether petitioner's constitutional rights were violated when, after arraignment, he stated his address in connection with his release on bail and the return of certain belongings seized at the time of arrest.
6. Whether the trial court abused its discretion in admitting certain evidence or gave erroneous instructions to the jury.
7. Whether the evidence was sufficient to sustain the conviction.

STATEMENT

Petitioner was charged in the United States District Court for the Eastern District of Missouri with violating 18 U.S.C. 1952 by traveling in interstate

commerce with intent to carry on an illegal gambling enterprise and thereafter carrying on this enterprise. After a jury trial, he was convicted and sentenced to imprisonment for three years and fined \$5,000. On appeal, a panel of three judges, with one judge dissenting, ruled that the conviction should be reversed on the ground that evidence had been seized under a search warrant issued without probable cause. Upon petition by the government, a rehearing *en banc* was ordered. Thereafter, the full court decided that there was no infirmity in petitioner's conviction, rejecting all of the contentions repeated here. Two of the eight judges (the majority of the original panel) dissented solely on the question of probable cause to sustain the warrant.

The search warrant authorized a search for book-making paraphernalia at Apartment F of the Chieftain Manor Apartments in St. Louis County, Missouri. The affidavit on the basis of which the United States Commissioner found probable cause was made by F.B.I. agent Robert Bender on Wednesday, August 18, 1965. It averred:¹ "The Federal Bureau of Investigation has been informed by a confidential reliable informant that William Spinelli [petitioner] is operating a handbook and accepting wagers and disseminating wagering information by means of the telephones which have been assigned the numbers of WYdown 4-0029 and WYdown 4-0136." The affidavit related that telephone company records showed that those numbers belonged to telephones in Apartment F

¹ The affidavit is set forth in full at Pet. App. A-86—A-88.

at 1108 Indian Circle Drive. The affiant further swore that on August 6, 1965, and on three occasions in the following week (August 11, 12 and 13), F.B.I. agents watched petitioner drive his automobile from East St. Louis, Illinois to St. Louis, Missouri; that on those three occasions and again on August 16, the agents saw petitioner park his automobile on the parking lot used by residents of the Chieftain Manor Apartments (including the building at 1108 Indian Circle Drive); and that on August 13, an agent saw petitioner enter Apartment F. Agent Bender further alleged that petitioner was personally known to him, and to other federal and local enforcement agents, "as a bookmaker, an associate of bookmakers, a gambler, and an associate of gamblers." *

Following the issuance of the search warrant, F.B.I. agents stationed themselves across from Apartment F. When petitioner emerged from the apartment about two hours later, they served him with an arrest warrant, and used a key found in the course of searching him pursuant to this arrest to unlock the door to Apartment F. They then executed the search warrant and seized items (R. 144-147, 173-181) de-

* At the hearing on the motion to suppress the evidence obtained under this search warrant, it was revealed that the informant who had told Special Agent Bradley earlier in the month that petitioner was using these specific telephone numbers in conducting a gambling operation had, since 1963, been furnishing the agent with weekly information which had proved to be reliable (M. 10, 32, 35). ("M" refers to the hearing on pretrial motions. "R" refers to the transcript of the trial.)

scribed as gambling paraphernalia by an expert witness at the trial (R. 192-196, 199-217).³

ARGUMENT

1. Petitioner's initial argument that the government is not constitutionally or statutorily permitted to petition for rehearing *en banc* is dispositively answered by *Forman v. United States*, 361 U.S. 416. There, distinguishing *Sapir v. United States*, 348 U.S. 373, on which petitioner relies (Pet. 15), this Court unanimously upheld the appropriateness of a government request for rehearing even where the original opinion had directed a judgment of acquittal. As to the original ruling of the court of appeals, this Court said (361 U.S. at 426):

Its original direction was subject to revision on rehearing. The original opinion was entirely interlocutory and no mandate was ever issued thereon. It never became final and was subject to further action on rehearing. * * *

See, also, *United States v. Healy*, 376 U.S. 75, 77-80.

2. The F.B.I. agent's affidavit adequately supported the Commissioner's finding of probable cause, and the warrant was properly executed.

(a) The affidavit contained sufficient facts from which the Commissioner could perform his function of independently evaluating the existence of probable cause. The affidavit disclosed that an informant, at

³ The other events material to disposition of this case are accurately summarized in petitioner's statement (Pet. 10-11).

tested to be reliable, had informed the F.B.I. that petitioner was utilizing telephone numbers WYdown 4-0029 and WYdown 4-0136 in operating a handbook. This information, in turn, was corroborated by the other facts in the affidavit—that an F.B.I. surveillance showed that petitioner was currently engaged in regular interstate travel to an apartment that, according to telephone company records, contained the very telephones which petitioner was reported to be using in gambling operations; and, in addition, the affiant stated that he and other law officers knew petitioner to be a gambler. While any one of these facts, standing alone, might not have been sufficient, it was clearly reasonable for the Commissioner to conclude that the totality of circumstances established probable cause for the issuance of the warrant.

The Commissioner, moreover, was apprised of "underlying circumstances" corroborating the informant, viz., the surveillance by the agents, the matching telephone numbers and the reputation of the petitioner. See *Jones v. United States*, 362 U.S. 257. Neither *Aguilar v. Texas*, 378 U.S. 108, nor *Riggan v. Virginia*, 384 U.S. 152, requires more than was present here. In those cases, the applications for the warrants stated simply that undisclosed information from reliable sources showed illegal activity at particular premises. Significantly, the Court said in *Aguilar*, that, if the facts and results of a surveillance "had been appropriately presented to the magistrate,"—as they were reported here—"this would, of course, present an entirely different case." 378 U.S. at 109, n. 1.

(b) The federal officers delayed execution of the warrant until petitioner emerged from the apartment, a period of about two hours from the time of their arrival at the building. This did not violate the requirement of Rule 41, F. R. Crim. P., that a search warrant shall command a search "forthwith." Rule 41 itself sets a ten-day time limit on executing search warrants. Thus, "forthwith" can not mean "immediately." Certainly a delay of two hours, at least in the absence of untoward design, does not vitiate the authority to search. There is nothing in this case to suggest that the delay was either prejudicial or anything other than prudent. As the court below observed (Pet. App. A-41): "In this case, had the officers knocked at the door the evidence of gambling might well have been flushed down the commode before the officers could have forced their way into the apartment."

(c) The warrant authorized the seizure of "bookmaking paraphernalia, scratch sheets, bet tabs, pay and collection sheets, bookmaking records, baseball schedules, books and records of bets received, accounts, bookmaker's ledger sheets, two telephones." There is no merit to petitioner's complaint that the executing officers exceeded their authority in seizing, among other items, an adding machine, pencil sharpener, blank deposit slips, \$22.00 in currency, a radio, a pair of glasses, a watch, graph paper, four pens, two pencils, the lease for the premises, and five telephones (instead of two). All of these items, when connected with other objects obviously related to the gambling

business, could properly be considered to fall within the general category of "bookmaking paraphernalia".

3. After petitioner's arrest on August 18, he was released on bond. The preliminary hearing scheduled for September 3 was postponed on the government's motion, and on September 15, 1965, the grand jury returned an indictment. The return of the indictment supplanted the function of the preliminary hearing by establishing probable cause, and it thus eliminated any need for a preliminary hearing. Rule 5(c), F. R. Crim. P., does not create or protect the right to discovery that petitioner claims. The courts of appeals, with the possible exception of the District of Columbia,⁴ have consistently so held. See, e.g., *United States v. Aiken*, 373 F.2d 294 (C.A. 2), certiorari denied, October 9, 1967; *United States v. Chase*, 372 F.2d 453, 467 (C.A. 4); *Byrnes v. United States*, 327 F.2d 825, 834 (C.A. 9), certiorari denied, 377 U.S. 970.

4. The indictment was in no way deficient. It charged that petitioner violated 18 U.S.C. 1952 by traveling between Illinois and Missouri at various times during the period of August 6 to August 18, 1965, with intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment and carrying on of an unlawful activity, namely, a business enterprise involving gambling in violation of Section 563.360, Mo. Rev. Stat. 1959 (Pet. App. A-81), and by carrying on this unlawful

⁴ The law in the District of Columbia is not clear. Compare *Grump v. Anderson*, 352 F.2d 649 (C.A.D.C.), with *Ross v. Sirica*, 380 F.2d 557 (C.A.D.C.).

activity thereafter. More specificity was not required. *Turf Center, Inc. v. United States*, 325 F.2d 793 (C.A. 9). As to the claim that Congress did not intend this statute to be applied to a single individual, a similar argument was recently rejected by this Court under a companion statute, 18 U.S.C. 1953. *United States v. Fabrizio*, 385 U.S. 263. Equally without merit are petitioner's contentions that the statute is unconstitutionally vague, see *Turf Center, Inc. v. United States*, 325 F.2d 793 (C.A. 9); *United States v. Zizzo*, 338 F.2d 577 (C.A. 7), certiorari denied, 381 U.S. 915, and violates the Equal Protection Clause and the Tenth Amendment.

5. On the morning following his arrest, petitioner appeared before a United States Commissioner with his retained counsel, was advised of his constitutional rights, and admitted to bail. At that time he signed an appearance bond in which he gave an Illinois address. At the trial, the government introduced evidence that petitioner had appeared at the F.B.I. office about fifteen minutes after his release on bond to request the return of the keys which had been taken from him at the time of his arrest, one of which he mentioned was to his residence in Illinois (R. 149-150). The government also established that petitioner gave an Illinois address to a deputy marshal when his release on bond was being processed (R. 236).⁵

The record does not support petitioner's claim that he was compelled to furnish his address to the F.B.I.

⁵ There was other evidence of petitioner's Illinois address and his traveling between Illinois and Missouri (R. 121-128, 139-140, 143-144).

agent in order to get back his keys. It shows that petitioner appeared voluntarily at the F.B.I. office and asked for his keys. Despite petitioner's assertions, nothing in the record indicates that when petitioner voluntarily went to the F.B.I. office the agent conditioned the return of the keys on a statement from petitioner. While the record is not clear on whether petitioner was required to tell the deputy marshal his address so that he could be released on bond (see R. 237), there was no error in admitting evidence of this statement even if we assume it was obtained under such circumstances. Information as to where a defendant may be located is an essential and proper element of an effective bail system. Moreover, there is no indication that petitioner demurred at giving the information or that counsel sought in any way to secure the release of his client without this information. Petitioner was not prevented from having his counsel with him when he sought the keys or filled out the bail form. Hence *Escobedo v. Illinois*, 378 U.S. 478, does not apply. Not only did the events occur before indictment, but the circumstances are not remotely similar to those set forth in *Massiah v. United States*, 377 U.S. 201, or *Beatty v. United States*, No. 338, decided October 23, 1967, where government agents obtained post-indictment statements from defendants in the absence of counsel at a time when both the defendants and their lawyers were unaware that the government was investigating their activities.*

* This case was tried before *Miranda v. Arizona*, 384 U.S. 436, and, apart from the fact that in this case petitioner had

6. Petitioner's attacks on various rulings made at trial do not warrant further review.

(a) The F.B.I. agent who qualified as an expert witness was thus properly allowed to explain to the jury that the various paper exhibits were used in the gambling business (R. 199-217). *United States v. Altieri*, 343 F.2d 115, 119 (C.A. 7), reversed on other grounds, 382 U.S. 867. Otherwise, the codes and symbols would have been meaningless to the jury. Contrary to petitioner's assertion (Pet. 36), *United States v. Sette*, 334 F.2d 267 (C.A. 2), is not to the contrary; there the officers in charge of the investigation attempted to supply a defect in the proof by stating their conclusion that the defendant had a proprietary interest in the gambling business involved, and that practice, quite unlike the expert explanation in this case, was held to be impermissible.

(b) In addition to showing that two telephones had been installed in the apartment involved herein in November 1964, the government also showed the installation in the same month of two other telephones at a second apartment (R. 23-26, 114-115) where petitioner was shown to have engaged in a handbook operation between November 1964 and January 1965 (R. 30-32, 60-79, 97-102, 137-138). This evidence was properly admitted, as the court below found, to prove both lack of innocent purpose and involvement in a "business enterprise", elements of the crime

received full warnings, had counsel, and was not being "interrogated" by the deputy marshal, *Johnson v. New Jersey*, 384 U.S. 719, makes *Miranda* inapplicable.

charged. The fact that the other handbook operation occurred seven months earlier than the operation alleged in the indictment did not make evidence thereof too remote to be admissible. Its weight was properly a jury question.

(c) The State statute involved, Section 563.360, Mo. Rev. Stat. 1959 (Pet. App. A-81 to A-82), makes it a crime to occupy any room with any book, sheet, or blackboard for the purpose of recording a bet. The court instructed the jury that it could find that petitioner violated this statute if it found that petitioner was engaged "in accepting wagers on athletic contests and in furnishing odds or point spreads in athletic contests as a business enterprise" (R. 294). Since the instruction required the jury to find that petitioner both accepted wagers and recorded odds, it was proper even if Missouri law permits the furnishing of odds.

7. Petitioner's challenge to the sufficiency of the evidence—rejected by the district court and the court of appeals *en banc*—is not an issue calling for further review. The total circumstances of this case—regular interstate trips to the apartment, the solitary presence of petitioner in the room with the gambling paraphernalia for over two hours, the prior operation of the handbook—warranted the conclusion that petitioner traveled in interstate commerce with intent to carry on an illegal gambling enterprise and thereafter carried on this illegal activity.

CONCLUSION

It is respectfully submitted that the petition for a
writ of certiorari should be denied.

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In the Supreme Court of the United States

October Term, 1968

No. 8

WILLIAM SPINELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals *en banc* (A-19-73) is reported at 382 F. 2d 871. The opinion of the panel (5 R. 1-20) is not reported.

JURISDICTION

The judgment of the court of appeals *en banc* was entered on July 31, 1967 (A. 17-18). A petition for rehearing was denied on September 12, 1967 (4 R. 72). Mr. Justice White extended the time for filing a petition for a writ of certiorari to November 11, 1967. The petition was filed on November 8, 1967, and was granted on March 4, 1968 (390 U.S. 942). On May 27, 1968, the order granting the petition was modi-

filed so as to limit review to the question of the constitutional validity of the search and seizure. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

~~arguing before the trial judge and the court~~

~~QUESTIONS PRESENTED~~

1. Whether the United States Commissioner could reasonably find, on the basis of the affidavit submitted, that there was probable cause to issue a search warrant.
2. Whether the search warrant was properly executed.

~~CONSTITUTIONAL PROVISION AND RULE INVOLVED~~

The Fourth Amendment to the Constitution of the United States provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Rule 41 of the Federal Rules of Criminal Procedure provides in pertinent part:

(a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a judge of the United States or of a state, commonwealth or territorial court of record or by a United States commissioner within the district wherein the property sought is located.

(b) **Grounds for Issuance.** A warrant may be issued under this rule to search for and seize any property.

(2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; * * *

(c) **Issuance and Contents.** A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant * * * shall command the officer to search forthwith the person or place named for the property specified. * * *

(e) **Motion for Return of Property and to Suppress Evidence.** A person aggrieved by an unlawful search and seizure may move the district court for the return of the property and to suppress for use as evidence anything so obtained on the ground that * * *(3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued.

STATEMENT

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Petitioner was convicted by a jury in the United States District Court for the Eastern District of Missouri of traveling in interstate commerce with intent to carry on an illegal gambling enterprise, and thereafter carrying on that enterprise, in violation of 18 U.S.C. 1952 (1 R. 1). He was sentenced to three years' imprisonment and fined \$5,000. A panel of the court of appeals, one judge dissenting, reversed the conviction on the ground that evidence had been seized under a search warrant issued without probable cause. On the government's petition for rehearing *en banc*, the full court, two judges (the majority of the original panel) dissenting, held that there was no infirmity in either the issuance or the execution of the warrant.

(1) *The information possessed by the FBI agents.*— In January 1965, F.B.I. agents who were present in an apartment at Pauline Place in St. Louis, Missouri, with permission of its occupants, overheard a bookmaking operation being conducted over telephones in a neighboring apartment used by petitioner. The overhearing, which was not assisted by any mechanical amplification, was apparently made possible by the absence of carpeting or rugs on the floor of the apartment used by petitioner (3 R. 32-33, 39-42, 45-47, 59-69, 72-82, 98-100). In early August 1965, an informant who had been furnishing a St. Louis F.B.I. agent accurate information on a weekly basis since 1963, told the agent that petitioner was conducting a gambling operation over telephone numbers WYdown 4-0136 and WYdown 4-0029 (A. 15-16, 11-12).

Thereafter F.B.I. agents conducted a surveillance of petitioner for approximately three weeks between August 6, 1965 and August 18, 1965. On the days they observed petitioner, they saw him depart in the late morning from his residence in East St. Louis, Illinois, and drive to St. Louis, Missouri (1 R. 58-59, 70-71), and, in the afternoon between 3:22 p.m. and 3:55 p.m., enter an apartment building at 1108 Indian Circle Drive. On one occasion they saw him enter the particular apartment, Apartment F, to which the two telephone numbers named by the informant were assigned (1 R. 74-75).¹

(2) *The application for the search warrant.*—On Wednesday, August 18, F.B.I. Agent Bender, who had participated in both the investigation of Indian Circle Drive (1 R. 58-59) and the earlier investigation at Pauline Place (3 R. 137-138, 150-151, 100-102, 105), filed a sworn complaint before the United States Commissioner at St. Louis, Missouri, charging that petitioner had violated 18 U.S.C. 1952. He also filed an affidavit for a search warrant which stated that he had reason to believe that at Apartment F, 1108 Indian Circle Drive, certain property was being concealed, "namely bookmaking paraphernalia, scratch sheets, bet tabs, pay and collection sheets, bookmaking records, baseball schedules, books and records of bets received,

¹ Telephone company records showed that these numbers were assigned to Mrs. Grace P. Hagen (1 R. 26). They also showed that these telephones and the telephone at petitioner's Pauline Place apartment were installed in the same month, November 1964 (3 R. 28-29, 114-115).

accounts, bookmaker's ledger sheets, two telephones," which had been used to violate 18 U.S.C. 1952 (A 1-2). The supporting grounds to which he swore in the affidavit were as follows (A 3-5):

"The Federal Bureau of Investigation has been informed by a confidential reliable informant that William Spinelli [petitioner] is operating a handbook and accepting wagers and disseminating wagering information by means of the telephones which have been assigned the numbers of WYdown 4-0029 and WYdown 4-0136." Telephone company records show that those two telephones are assigned to Grace P. Hagen in Apartment F at 1108 Indian Circle Drive. On August 6, 1965, and on three occasions in the following week (August 11, 12 and 13), between 11:16 a.m. and 12:07 p.m., F.B.I. agents saw petitioner drive his automobile from East St. Louis, Illinois, to St. Louis, Missouri. On the two latter occasions and once in the following week (August 16), between 3:22 and 3:45 p.m., the agents saw petitioner park his automobile on the parking lot used by residents of 1108 Indian Circle Drive and thereafter enter the apartment building. On August 13, at 3:55 p.m., an agent saw petitioner enter Apartment F. Petitioner was personally known to the affiant, and to other federal and local law enforcement agents, "as a bookmaker, an associate of bookmakers, a gambler, and an associate of gamblers." ~~(3) Execution of the warrant.~~ — The FBI agents arrived at the apartment building at approximately 5 p.m. on the same day that the warrants were issued,

and stationed themselves in an apartment across from Apartment E. When petitioner emerged from Apartment E about two hours later, they served him with the arrest warrant. Using a key found in a search of his person pursuant to the arrest, they unlocked the door to Apartment E. They then executed the search warrant and seized several items (A. 12-14; 3 R. 144-147, 173-181) described as gambling paraphernalia by an expert witness (3 R. 192-196, 199-217).

SUMMARY OF ARGUMENT

When an affidavit presents sufficient facts on which the commissioner can make an independent finding of probable cause to search, his decision to issue a warrant should not be set aside by the courts unless it is clearly unreasonable; doubtful cases should be resolved in favor of the commissioner's finding. The affidavit here stated that the FBI had been told by a reliable informant that petitioner, whom the agents knew to be a bookmaker, was conducting a handbook operation through the use of two specified telephone numbers. It also related that both telephone numbers were located in the same apartment, and that the agents had just completed a three-week surveillance of petitioner showing that he regularly went to that apartment in the afternoon hours. On the basis of those facts, the commissioner could reasonably believe that gambling paraphernalia used to violate 18 U.S.C. 1932 were located in the apartment.

Of course, the commissioner cannot accept "without question" the mere conclusion of an informant on whom the officers rely; he must be informed of some of the underlying circumstances on which he can determine whether the information is trustworthy. The affidavit here presented is substantial basis for crediting the hearsay information that petitioner was conducting a bookmaking operation through the use of two specified telephone numbers. The agent swore that the information had been furnished by a reliable informant. And the information evinced the informant's detailed knowledge of petitioner's bookmaking operation, thereby reducing the risk that it may have been the result of the informant's own mere suspicion.

Furthermore, unlike *Aguilar v. Texas*, 378 U.S. 108, and other cases relied on by petitioner, the hearsay information in this case was corroborated by the agent's own prior knowledge that petitioner was a bookmaker and by the results of the surveillance. The regular afternoon visits of a known bookmaker to an apartment which contained two telephones identified as being used to conduct a bookmaking operation was persuasive evidence of both the reliability of the informant and the specific allegation that petitioner was operating a handbook.

a. The two-hour delay between the time the agents arrived at the building and the time petitioner emerged from his apartment and was served with the warrants did not render the search unreasonable. The

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requirement in Rule 41 of the Federal Rules of Criminal Procedure that the warrant be executed "forth-with" means that the agents must act promptly and without unreasonable delay. In this case, the agents could reasonably have believed that an attempt to enter the apartment might have defeated the purpose of the search by allowing petitioner to destroy some of the bookmaking paraphernalia, and that waiting until petitioner left the apartment would reduce the risk of forceful resistance or any question as to the sufficiency of the required announcement. In all events, there is no indication that petitioner was in any way prejudiced by the two-hour delay.

b. The purpose of the search was to seize all instrumentalities used in the commission of a federal offense. In order to accomplish that purpose, some of these instrumentalities must be described in generic terms, because the agents cannot predict all the specific items which may be used in a particular bookmaking operation. The term "bookmaking paraphernalia" provided sufficiently specific directions to the agents and did not create an undue risk that items not subject to seizure would be taken. All of the items seized by the agents had a logical connection with a bookmaking operation. And the absence of clothing, furniture, and personal articles in the apartment indicated that the apartment and all its contents were used solely for bookmaking purposes.

ARGUMENT

THE AFFIDAVIT PRESENTED SUFFICIENT FACTS TO SUPPORT THE COMMISSIONER'S FINDING THAT THERE WAS PROBABLE CAUSE TO ISSUE A SEARCH WARRANT

A. A COMMISSIONER'S FINDING OF PROBABLE CAUSE, BASED ON AN AFFIDAVIT CONTAINING FACTS ON WHICH HE CAN MAKE AN INDEPENDENT JUDGMENT OF THE GROUNDS FOR A WARRANT, SHOULD NOT BE SET ASIDE UNLESS CLEARLY UNREASONABLE.

"Probable cause under the Fourth Amendment exists where [the facts and circumstances within the [officer's] knowledge, and of which he has reasonably trustworthy information, are sufficient unto themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed." *Berger v. New York*, 388 U.S. 41, 55. Except in certain carefully defined classes of cases, however, the police may not lawfully search private property, "notwithstanding facts unquestionably showing probable cause" (*Agnello v. United States*, 269 U.S. 20, 33), unless they first obtain a valid search warrant. E.g., *Katz v. United States*, 389 U.S. 347, 356-359 & nn. 18-19; *Jones v. United States*, 357 U.S. 493, 497-499. As the Court said in *Johnson v. United States*, 333 U.S. 10, 14, the Fourth Amendment requires that the inferences from the facts asserted to show probable cause must be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."

In order for the warrant to be an effective safeguard of individual privacy, the magistrate must make an informed and independent finding of probable cause; he "must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause." *Giordenello v. United States*, 357 U.S. 480, 486. Thus, where the only information presented to the magistrate was the officer's belief that certain merchandise was in a specified location, or the recital that such information had been received from an informant, this Court has held the warrants invalid because the magistrate "necessarily accepted 'without question'" the officer's, or the informant's, "belief" or "mere conclusion." *Aguilar v. Texas*, 378 U.S. 108, 112-115; *Giordenello v. United States*, *supra*, 357 U.S. at 486; *Nathanson v. United States*, 290 U.S. 41, 46-47; see *Beck v. Ohio*, 379 U.S. 89, 96-97.

However, when a warrant is issued on the basis of an affidavit presenting facts on which the magistrate can make an independent determination, his finding of probable cause should not be set aside merely because a court might have reached a different conclusion. See *Aguilar v. Texas*, *supra*, 378 U.S. at 111; *Jones v. United States*, 362 U.S. 257, 271. "Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants." *United States v. Ventresca*, 380 U.S. 102, 109. Thus, a warrant may properly be issued on evidence of a

less "judically competent or persuasive character than would have justified an officer in acting on his own without a warrant." *Jones v. United States, supra*, 362 U.S. at 270. And affidavits for search warrants "must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion." *United States v. Ventresca, supra*, 380 U.S. at 108.

The preference to be accorded to warrants is in part a recognition that the act of applying for a warrant is an important step toward effectuating the constitutional protection against unreasonable searches and seizures. Given the inherent limitations of the judicial remedies for unconstitutional searches,² the general security of persons in their homes is far better served by rules which encourage resort to "antecedent justification." See *United States v. Lefkowitz*, 285 U.S. 452, 464.³ As the Court said in *Ventresca*, "A grudging or

² See *Terry v. Ohio*, No. 67, O.T. 1967 (decided June 10, 1968), Slip. Op. at 10-11: "Regardless of how effective the [exclusionary] rule may be where obtaining convictions is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forego successful prosecution in the interest of serving some other goal. Proper adjudication of cases in which the exclusionary rule is invoked demands a constant awareness of these limitations. * * *

³ As the Court stated in *Lefkowitz*, "Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime." (285 U.S. at 464). See *Jones v. United States, supra*, 362 U.S. at 270.

The application for a warrant, moreover, invokes the judicial fact-finding process at a time when it cannot be influenced by the results of the search. As the Court said in *Beck v. Ohio*,

negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting" (380 U.S. at 108).

The preference also reflects the fact that the magistrate's determination of probable cause is itself an independent, and perhaps the most significant, element of the constitutional protection. See *McDonald v. United States*, 335 U.S. 451, 455. The courts cannot and do not examine every warrant, but those cases in which they do review a magistrate's findings significantly influence the entire process. Were the courts routinely to assume the function of passing *de novo* on grounds for issuing a warrant, it would tend to demoralize the magistrates, and to discredit the warrant process, without any compensating increase in the protection of individual rights. Both institutional considerations, therefore, and the less formalized burden and type of proof on the issue of probable cause—particularly the use of hearsay information—demonstrate that a magistrate's finding of probable cause should not be set aside unless it is clearly unreasonable.

supra, "An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment" (379 U.S. at 96).

¹ See pp. 18-20; *infra*.

² See *United States v. Hasbun*, 345 F. 2d 111, 113 (C.A. 6).

BY OTHER STATED IN THEIR AFFIDAVIT, AMOUNTING TO THE WEIGHT OF
THE HEARSAY INFORMATION, WHEN SUFFICIENT TO ESTABLISH
PROBABLE CAUSE.

(86) ~~gives stated probable cause is of composite weight~~

Since the affidavit in this case relied heavily on hearsay information, petitioner's challenge to the sufficiency of the affidavit presents two related questions: whether there was a substantial basis for crediting the hearsay as fact upon which a finding of probable cause could be made; and, if so, whether the facts were sufficient to support the commissioner's determination of probable cause. Compare *Giordenello v. United States*, *supra*, 357 U.S. at 485; *Jaben v. United States*, 381 U.S. 214, 223. Although the reliability of the hearsay is the more significant issue, petitioner alleges several deficiencies in the factual basis for the warrant which can be considered without reference to the hearsay question. In this section, therefore, we will discuss the reasonableness of the commissioner's finding of probable cause on the assumption that the hearsay is trustworthy.

The affidavit presented the following essential facts: FBI agents, who knew petitioner to be a bookmaker, received information from a reliable informant that petitioner "is operating a handbook and accepting wagers and disseminating wagering information" by means of two telephones with specified numbers. Telephone company records showed that both numbers were assigned to Apartment E in the apartment building at 1108 Indian Circle Drive in St. Louis. During

a three-week surveillance of petitioner, the agents now him regularly, in the afternoon, go to the building at 1108 Indian Circle Drive; on one occasion, petitioner was observed to enter Apartment B, the apartment where the telephones specified by the informant were located.

The information that petitioner "is operating" a bookmaking enterprise, together with petitioner's conduct observed by the agents, established probable cause for the issuance of the warrant. When petitioner was observed on one occasion to enter the apartment where the telephone numbers specified by the informant were located, the Commissioner could reasonably infer that petitioner's regular afternoon visits were to that apartment. The regular visits of a known bookmaker to an apartment which contained the two telephones identified as being used to conduct a book-

"Contrary to petitioner's assertion (Br. 18), it is immaterial that the affidavit did not allege that this information had been received by the affiant. In *Rugendorf v. United States*, 376 U.S. 529, 530-531, the Court upheld a warrant based on an affidavit in which much of the incriminating information had been supplied by informants to another FBI agent who in turn related it to the affiant. As the Court stated in *United States v. Ventresca*, *supra*, 308 U.S. at 111, "Observations of fellow officers of the Government engaged in a continuous investigation are plainly a reliable basis for a warrant applied for by one of their number." It is equally reasonable to assume, as a general principle, that agents may be relied upon accurately to relate information which they have received from third persons. Indeed, unless separate affidavits have to be prepared from each agent participating in an investigation, the affiant need, as he did in this case, furnish information which he has received from other agents who did not obtain it on his behalf.

bookmaking operation provided adequate reason to believe that petitioner was maintaining the handbook operation in that apartment. See *McCray v. Illinois*, 386 U.S. 360, 302-304; *Rugendorf v. United States*, 376 U.S. 528, 530-533; *Jones v. United States*, *supra*, 362 U.S. at 267-271 & n. 2; *Draper v. United States*, 358 U.S. 307, 309-310, 312-313; *Brinegar v. United States*, 338 U.S. 160, 162-163, 166-171, 176-177. Contrary to the suggestion in the dissent below (A. 64-68 & nn. 6, 9), it is not necessary that the affidavit allege that bookmaking paraphernalia had been observed in the apartment. See *Draper v. United States*, *supra*, *Brinegar v. United States*, *supra*, 338 U.S. at 169-171. The telephones themselves were subject to seizure as instrumentalities used in the commission of a federal offense,¹ and it was entirely reasonable for the commissioner to infer that other paraphernalia commonly associated with bookmaking could also be found in the same apartment as the telephones.

¹Contrary to petitioner's contention (Br. 20-21), the affidavit is not defective because it fails to allege any specific overt act in furtherance of the gambling activity committed after the interstate travel, as required by 18 U.S.C. 1952. Although the affidavit must present facts to establish probable cause to believe that the property to be seized has been used in the commission of a federal offense, it is not necessary that the affidavit contain the specific allegations required of an indictment. On the basis of the affidavit, the commissioner could reasonably believe that petitioner's visits to the apartment after the interstate travel were for the purpose of carrying on his bookmaking operation in that apartment. That finding is sufficient. The fact that the original indictment in this case was dismissed in no way indicates that the commissioner, or the agents, were unaware of the requirements of 18 U.S.C. 1952.

Although the affidavit did not specify when the informant had advised the agents of petitioner's bookmaking operation, that omission does not, as petitioner contends (Br. 19-20), render the affidavit defective. Unlike *Rosenzweig v. United States*, 356 F. 2d 810 (C.A. 1), relied on by petitioner, the affidavit here set out the dates of the agents' observations, showing that a surveillance was conducted during the three weeks immediately preceding the application for a warrant. The commissioner could reasonably infer that the agents were acting on current information when they initiated an extensive surveillance, particularly since the affidavit used the present tense. See *United States v. Conte*, 361 F. 2d 153, 156 (C.A. 2). Furthermore, assuming, as we do here, that the information was accurate when it was received by the agents, it provided reason to believe that the apartment where the telephones were located would be used by petitioner to carry on a bookmaking operation. When it was shown that immediately preceding the application for a warrant petitioner was making regular visits to that apartment, it was reasonable for the commissioner to infer that the purpose of petitioner's visits was to engage in bookmaking and that petitioner had not abandoned the handbook operation in favor of some other enterprise which also would cause him regularly to visit the apartment.

~~RECORDED AND INDEXED
C. THE COMMISSIONER COULD REASONABLY BELIEVE THAT THE INFORMATION FURNISHED BY THIS INFORMANT WAS RELIABLE~~

1. The principal question presented by petitioner's challenge to the affidavit is, in our view, whether the

information furnished by the informant was sufficiently trustworthy to provide a basis for the commissioner's finding of probable cause. In *Jones v. United States*, *supra*, 362 U.S. at 269, the Court held that a valid warrant may be issued on the basis of an affidavit which rested entirely on hearsay information, "so long as a substantial basis for crediting the hearsay is presented." See *Aguilar v. Texas*, *supra*, 378 U.S. at 114. But where the affidavit indicates the underlying circumstances supporting the affiant's or the informant's belief, "where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the courts should validate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner." *United States v. Ventresca*, *supra*, 380 U.S. at 109.

The policies which underlie the "preference to be accorded to warrants" are particularly clear when the issue involves the reasonableness of a commissioner's belief in the accuracy of hearsay information. As the Court said in *Ventresca* (380 U.S. at 108), affidavits "are normally drafted by nonlawyers in the midst and haste of a criminal investigation." Without the benefit of an adversary proceeding, or the assistance of a lawyer to draw from him relevant information and to guide him in the manner and sufficiency of its presentation, the police officer cannot be expected to produce a document which would pass the elaborate tests which lawyers may devise to establish the accuracy of hearsay.

~~A continued course of dealings with an informant will result in a reliable and organized~~

NOT
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whom the officer has grown instinctively to trust often may be summarised, as in the present case, in a conclusory statement. In other instances, the failure to recite the source of the informant's knowledge may not appear to the officer to require an explanation, either because of the nature of the informant's operations and the fact that he had previously supplied information of a similar character which proved accurate, or, as here, because the officer has satisfied himself by his own independent investigation that the information is accurate. The obtaining of search warrants would be substantially discouraged by requirements of specificity which police officers realistically cannot be expected to satisfy.

Moreover, there are practical limitations on the extent to which an affidavit can demonstrate the reliability of the hearsay information it contains. A police officer, and even a lawyer, cannot be expected to set forth in the affidavit all of the facts that would be developed in a judicial inquiry as to the reliability of hearsay.¹ If the test of the validity of a warrant was whether the affidavit answered all the questions which might occur to a court on review, few warrants would be sustained, and the police would be effectively deprived of the use of informants to supply the facts necessary to obtain a warrant.² The Constitution does not require such a test. Probable cause, as the Court said in *Brinegar v. United States*, 388 U.S. 160, 175, "deals[s] with probability."

¹ Compare *Jaben v. United States*, 381 U.S. 214, 223-225.
² See *Lewis v. United States*, 385 U.S. 206, 210.

ties. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." The constitutional safeguard, therefore, may be satisfied by a finding that, on all the facts in the affidavit, the commissioner could reasonably believe that the hearsay information was trustworthy. The teaching of *Ventresea* is that "requirements of elaborate specificity" are not to be applied to the affidavit; its factual allegations need not satisfy each component of a rigid formula. As long as the affidavit provides a substantial basis for crediting the hearsay, the warrant should not be invalidated because the affidavit fails to supply other information which also would be relevant to the issue.

2. Petitioner's argument rests primarily on *Aguilar v. Texas*, *supra*, and particularly on the following statement (378 U.S. at 114):

Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, *Jones v. United States*, 362 U.S. 257, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see *Rugendorf v. United States*, 376 U.S. 528, was "credible" or his information "reliable. . . ."

The affidavit in *Aguilar* recited only that the affiants "have received reliable information from a credible

person and do believe that heroin, marijuana, barbituates and other narcotics" were being kept for sale at a particular house (*id.* at 109). The Court held that a warrant based on that information, like the warrants in *Nathanson* and *Giordenello*, manifestly had not been issued upon the magistrate's independent determination of probable cause: "He necessarily accepted 'without question' the informant's 'suspicion,' 'belief' or 'mere conclusion'" (*id.* at 114).¹⁰ The affidavit in the present case, however, read fairly as a whole (see *United States v. Ventresca, supra*, 380 U.S. at 111), provided sufficient facts upon which the commissioner could make an independent finding that the informant's information was trustworthy. The intrinsic facts of the hearsay information, corroborated by the agents' own knowledge and the results of their surveillance, provided a "substantial basis" for crediting the hearsay.

The affidavit presented the hearsay information in the following statement: "The Federal Bureau of Investigation has been informed by a confidential reliable informant that William Spinelli is operating a handbook and accepting wagers and disseminating wagering information by means of the telephones which have been assigned the numbers WYdown 4-0029 and WYdown 4-0136" (A. 5). Although those facts may not be sufficient, by themselves, to establish the

¹⁰ The Court's opinion in *Aguilar* apparently assumes that the informant had told the officers that narcotics could be found at that house. It is not entirely clear from the affidavit in *Aguilar*, however, exactly what information was given to the officers. Compare *Beck v. Ohio, supra*, 379 U.S. at 87.

reliability of the hearsay information, they do support the reasonableness of the commissioner's belief that the information was trustworthy. The affidavit stated that the information had been furnished by a "confidential reliable" informant. Interpreting those words in a "commonsense and realistic fashion" (*Ventresca, supra*, 380 U.S. at 108), the commissioner reasonably could infer that a sworn statement by a federal agent that an informant was reliable, meant that the informant had provided accurate information in the past. Indeed, that is precisely what a "confidential reliable" informant means in this context.

In *Rugendorf v. United States*, 376 U.S. 528, 530, the Court upheld a warrant which was issued solely on the basis of hearsay information furnished by three persons, who were described respectively as "a confidential informant who had furnished reliable information in the past," "a confidential informant whom the FBI had found to be reliable," and "another confidential informant who had furnished reliable information to the [FBI] in the past." And in *Aguilar*, the Court cited, as satisfying the standards announced in that case, the affidavit in *Jones*, which stated only that "the source of information * * * has given information to the [affiant] on previous occasion and which was correct" (378 U.S. at 114-115 n. 5; 362 U.S. at 267-268 n. 2).¹¹ In this case, an argument based on

¹¹The Court's approval in *Aguilar* of the *Jones* affidavit, moreover, indicates that in a case where the affidavit is based entirely on hearsay information, the underlying facts sufficient to establish the general credibility of the informant may be satisfied by a statement that the informant had furnished correct information on one previous occasion.

the difference between "a reliable informant" and "an informant who has provided reliable information in the past" invokes the "hypertechnicalities" which this Court criticized in *Ventresca*. But even if that difference is material, the commissioner was at least entitled to give some weight to the fact that the FBI thought the informant sufficiently reliable to conduct a three-week surveillance, involving several agents, to determine whether petitioner's activities involved any violation of federal law.

Furthermore, unlike the affidavits in *Aguilar* and *Riggan v. Virginia*, 384 U.S. 152,¹¹ and the testimony in *Beck v. Ohio*, *supra*, the affidavit here recited that the informant had given specific information as to the type of petitioner's gambling operation (a handbook), the way in which it was carried out (by telephone), and the precise telephone numbers which were used. The specificity of information is an important factor in assessing its reliability; it is a measure of the informant's knowledge of the critical fact—here, petitioner's gambling operation—in issue on the application for a warrant. The details given bespeak an actual knowledge of petitioner's business. Their presence significantly reduced the risk that the information was the product of the informant's own mere suspicion or belief that petitioner was engaged in a gambling

¹¹The affidavit in *Riggan* stated only that the application for a warrant was based upon "[p]ersonal observation of the premises and information from sources believed by the police department to be reliable" (*Riggan v. Commonwealth*, 144 S.E. 2d 298, 299, n. 1 (W. Va. 1965)). There is no indication that any additional facts were presented to the issuing magistrate.

operation. See *Aguilar v. Texas*, *supra*, 378 U.S. at 113-114 & n. 4. Relying on the Court's discussion in *Aguilar*, petitioner contends that the information cannot be considered trustworthy because the affidavit did not state that the information was based on the informer's personal participation in or observation of the bookmaking activity (Br. 19). *Aguilar* does not necessarily establish, however, that information which does not result from an informant's own observation is to be considered inherently unreliable; a "substantial basis" for crediting such information may exist where an informant previously has furnished accurate information which, perhaps because of his own circumstances, he must gather from other sources trusted by him. In all events, the affidavit here, unlike that in *Aguilar*, presented the agent's own prior knowledge and that obtained by the surveillance of petitioner to corroborate the hearsay information. As the Court stated in *Aguilar* itself, those facts materially distinguish the present case from cases in which the affidavit rests solely on hearsay (378 U.S. at 109 n. 1). The fact that the police may have kept petitioner's house under surveillance is thus completely irrelevant in this case, for, in applying for the warrant, the police did not mention any surveillance. * * * If the fact and results of such a surveillance had been appropriately presented to the magistrate, this would, of course, present an entirely different case.

The affidavit stated that petitioner was known to be a bookmaker by the affiant and other federal agents.

The fact that petitioner was a known bookmaker, as the Court said in *Jones*, "made the charge against him much less subject to scepticism than would be such a charge against one without such a history" (862 U.S. at 271). Furthermore, the affidavit detailed the results of the agents' own investigation. Their inquiries of the telephone company showed that the two telephone numbers specified by the informant were both in operation and that both numbers were assigned to the same apartment. And their three-week surveillance of petitioner's activities showed that he regularly visited that apartment in the afternoon hours. While regular visits to an apartment might not, in most cases, suggest any illegal activity, the agent's knowledge that petitioner was a bookmaker supports the reasonableness of the inference that his visits were in furtherance of the bookmaking operation, as the informant had advised. See *Brinegar v. United States*, *supra*, 338 U.S. at 169-170; *Husty v. United States*, 282 U.S. 694, 700-701.

The fact that a suspect engages in conduct which an informant advised the agents he would perform is persuasive evidence that the informant's information is reliable. *Draper v. United States*, 358 U.S. 307; see *McCray v. Illinois*, 386 U.S. 300, 304; *Scher v. United States*, 305 U.S. 251, compare *Beck v. Ohio*, 379 U.S. 89, 94. It is not necessary that the conduct observed by the agents itself indicate illegal activity. In cases involving arrests without a warrant, where more compelling evidence would be required than in the present case, the Court has held that the observation of "mat-

ters in themselves totally innocuous" (*Jones v. United States*, *supra*, 362 U.S. at 269-270) is sufficient corroboration to establish the reliability of the incriminating information.

In *Scher v. United States*, *supra*, federal officers received confidential information "thought to be reliable" that a specific car would transport liquor from a specific dwelling. Thereafter, the officers observed movements which coincided with that information but which would not be sufficient, without the informer's tip, to establish probable cause. The Court upheld a search incident to a warrantless arrest. In *Draper*, an agent made an arrest without a warrant on the basis of information furnished by a reliable informant that Draper was selling narcotics and would return by train with narcotics in his possession. The informant also gave a physical description of Draper and said that he would be carrying a tan zipper bag. Based on this information, the agent arrested the defendant shortly after he alighted from the train. This Court held that there was probable cause for the arrest, noting that the agent had verified every facet of the information except whether the defendant had the narcotics in his possession (358 U.S. at 313).

And surely, with every other bit of Hereford's information being thus personally verified, Marsh had "reasonable grounds" to believe that the remaining unverified bit of Hereford's information—that Draper would have the heroin with him—was likewise true.

More recently, in *McCray*, the Court held there was probable cause to arrest without a warrant where the police had been told by an unnamed reliable informant that the defendant had narcotics on his person and could be found at a particular place at a particular time.

Indeed, the nature of the information furnished to the agents in this case allowed more reliable corroboration than the information supplied in the preceding cases. Unlike the isolated transactions described by the informants in *Draper*, *Scher*, and *McCray*, illegal bookmaking is a business activity, conducted on a regular basis, frequently through the use of multiple telephones, and requiring a regular base of operation. The informant here did not merely alert the agents to a single visit by petitioner to an apartment. The conduct observed by the agents substantially reduced the risk that the apartment could have been subjected to an erroneous search merely because petitioner happened to visit there for a lawful purpose. Regular visits by a known bookmaker to an apartment with multiple telephones itself creates a suspicion that the apartment is being used for gambling purposes. When it was shown that the telephone numbers specified by the informant were located in that apartment, the Commissioner could reasonably find that petitioner's conduct both confirmed the reliability of the information and corroborated the incriminating statement that petitioner was operating a handbook.

II

THE SEARCH WARRANT WAS PROPERLY EXECUTED**A. THE TWO-HOUR DELAY IN EXECUTING THE WARRANT WAS
NOT UNREASONABLE**

The agents delayed execution of both the search and arrest warrants until petitioner emerged from Apartment F, about two hours after they arrived at the building. During that period, they waited in a nearby apartment where they could observe the door to Apartment F (A. 12-14). Petitioner contends that since the agents made no effort "to enter the premises either by force or invitation," they violated both the requirement of Rule 41, F.R. Crim. P., and the command of the warrant itself, that the warrant be executed "forthwith."

Whether a search has been conducted "forthwith" depends upon the particular circumstances. Rule 41 specifies only a maximum period of ten days within which the warrant must be executed, and a delay of two hours after the agents arrived in the building where the apartment to be searched was located is not inconsistent with the Rule. See *Benton v. United States*, 70 F. 2d 24 (C.A. 4), certiorari denied, 292 U.S. 642 (delay of 1 day); *Mitchell v. United States*, 258 F. 2d 435 (C.A.D.C.) (delay of 5 days). The term "forthwith" is a direction to act promptly, within a reasonable time. See *Seymour v. United States*, 177 F. 2d 732 (C.A.D.C.).

There are several valid reasons why the agents might reasonably have decided to delay execution of the warrants until petitioner left the apartment. The agents might have wanted to eliminate any question as to the sufficiency of the announcement required

under 18 U.S.C. 3109, see *Sabbath v. United States* (No. 898, O.T., 1967, decided June 3, 1968), or to avoid any possibility that force would have been required to enter the apartment. They may have believed that serving the warrants in the hallway would reduce the risk of forceful resistance by petitioner. Perhaps the most likely reason for the delay was stated by the court below: "[H]ad the officers knocked at the door the evidence of gambling might well have been flushed down the commode before the officers could have forced their way into the apartment" (A. 39). Since the agents had a duty to seize the items named in the warrant, the concern that an attempt to enter the apartment would have resulted in the destruction of some of these items would be ample justification for the delay.

The requirement that officers execute a warrant "forthwith" serves several aims. It insures that the arrest or search is made for the purpose for which the warrant was issued. It protects individuals against unnecessary police surveillance and against the needless invasion of their premises to search for property which may have been removed or destroyed since the warrant was issued. The brief delay in the execution of the search warrant in this case contravened none of those policies and, as we have shown, was justified by several considerations.

B. THE WARRANT ADEQUATELY DESCRIBED THE PROPERTY TO BE
SEIZED, AND COVERED THE ITEMS TAKEN

The search warrant authorized the seizure of "bookmaking paraphernalia, scratch sheets, bet tabs, pay and collection sheets, bookmaking records, base-

ball schedules, books and records of bets received, accounts, bookmaker's ledger sheets, two telephones" (A. 6-7). Among the items seized were the following, which petitioner contends do not come within any of the above categories: an adding machine, pencil sharpener, blank deposit slips, \$22.00 in currency, a radio, a pair of eyeglasses, a watch, graph paper, four pens, two pencils, the lease for the premises, and five telephones (instead of two) (A. 8-11). At the time the agents executed the warrant, there was no clothing in the closets, no toilet articles in the bathroom, and only a daybed or couch in one of two bedrooms (3 R. 171-172). The lease was found on top of the refrigerator (3 R. 179). The other items, with the exception of the telephones and adding machine, were found on top of a table (3 R. 173-180). With the exception of the blank deposit slips and the graph paper, all of the items which petitioner contests were introduced in evidence by the government. The eyeglasses and the wrist watch, however, were offered in evidence only after petitioner brought out before the jury that they were seized but had not been introduced (3 R. 186-187).

In authorizing the seizure of "bookmaking paraphernalia" in addition to the other items enumerated, the search warrant did not violate the requirement of specificity. Where the object of a search, as here, is to confiscate all property which is subject to seizure as contraband by reason of its use in an illegal activity, some of that property must be described in generic terms. Otherwise, all of the instrumentalities of a

bookmaking enterprise could not be removed under a warrant unless the officer could anticipate each item of property used in the operation. Such minute description, even if possible, is not necessary to protect the right of privacy guaranteed by the Fourth Amendment. See *Berger v. New York*, 388 U.S. 41, 98-100 (Harlan, J., dissenting); *Warden v. Hayden*, 387 U.S. 294. Nor does a term describing gambling property by its use convert a specific warrant into a general warrant.

The subject of the search warrant here is totally unlike the invalid warrant which authorized the seizure of literary material in *Stanford v. Texas*, 379 U.S. 476, on which petitioner relies. The protection of First Amendment rights, of course, calls for more "sensitive tools". See *Speiser v. Randall*, 357 U.S. 513, 525. As this Court noted in *Marcus v. Search Warrant*, 367 U.S. 717, 731, where the warrant directed the seizure of obscene literature, "The authority to the police officers under the warrants issued in this case * * * poses problems not raised by * * * warrants to seize 'gambling implements' and 'all intoxicating liquors'."

When the agents entered the apartment in this case, it was immediately apparent, from the appearance of furniture, clothing, and personal articles, that the apartment and its contents were being used only for the illegal bookmaking activity. The adding machine, money, telephones, writing materials, radio, and watch were obviously related to the taking and recording of bets, and thus are fairly comprehended by the term



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No. 8.

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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

WILLIAM SPINELLI,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for
the Eighth Circuit.

BRIEF FOR PETITIONER.

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Davis v. United States, 8 Cir., 247 F. 394, 398	26
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Stanford v. Texas, 379 U. S. 476	27
Thomas v. United States, 5 Cir., 376 F. 2d 564	21
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Statutes and Rules Cited.

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Amendment V	3, 26

Federal Rules of Criminal Procedure:

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Rule 41	4, 21, 24, 26, 27

18 U. S. C., § 1952 (75 Stat. 498, Amended 79 Stat. 212)	3, 14, 19, 20
18 U. S. C., § 3109	23, 25
28 U. S. C., § 1254 (1)	2

Miscellaneous Cited.

Black's Law Dictionary, Fourth Edition	23
Conference Report No. 1161, dated September 11, 1961, 87th Congress, 1st Session	20
House Judiciary Committee Report No. 966, dated August 17, 1961	20
Senate Judiciary Committee Report No. 644, dated July 27, 1961	20
Webster's New Collegiate Dictionary	23

"bookmaking paraphernalia". The lease in the name of Grace Hagen also was a material instrumentality in the commission of the offense because it is frequently necessary to use a false name to conceal the identity of the true occupant of a gambling establishment. Even the eyeglasses were presumably used by petitioner in the course of his bookmaking operation, but the government did not introduce this item into evidence until the petitioner had raised a question about it. In all events, the seizure of that one item would not render the entire search and seizure unreasonable.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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AUGUST 1968.



PETITIONER'S BRIEF



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BRIEF FOR PETITIONER.

OPINIONS BELOW.

This cause was originally argued before a division of the United States Court of Appeals for the Eighth Circuit. On February 1, 1967, the division rendered its decision (R. V 21),¹ reversing petitioner's conviction, in a

¹ The certified transcript of the record filed by the Clerk of the United States Court of Appeals for the Eighth Circuit consists of five volumes. References to the record (R.) in this Brief shall be to the volume (in Roman numeral) and the page (in Arabic numeral). References to the Appendix (A.) shall be to the page (in Arabic numeral).

majority opinion written by Circuit Judge Heaney and concurred in by Circuit Judge Van Oosterhout (R. V 1-11). A dissenting opinion was written by Circuit Judge Gibson (R. V 12-20). These opinions have not been officially reported and were withdrawn on July 31, 1967 (R. V 22).

The Government sought and was granted a rehearing before the Court en banc (R. IV 1). After reargument before the entire Court, a decision (A. 17-18, R. IV 61) was rendered on July 31, 1967, affirming petitioner's conviction. The majority opinion was written by Circuit Judge Gibson for six members of the Court (A. 19-56, R. IV 2-42). A dissenting opinion was written by Circuit Judge Heaney in which Circuit Judge Van Oosterhout concurred (A. 56-73, R. IV 42-60). These opinions are officially reported at 382 F. 2d 871.

Certain orders were entered by District Judge Harper in ruling on various pre-trial motions filed by petitioner. These orders were not officially reported (A. 16-17, R. I 87-88, 89, 94).

JURISDICTION.

The judgment of the United States Court of Appeals was entered on July 31, 1967 (A. 17-18, R. IV 61). A timely petition for rehearing filed by petitioner (R. IV 62-71) was denied on September 12, 1967 (R. IV 72). The petition for writ of certiorari, presenting eleven different questions, was filed on November 8, 1967, and was granted as to all questions on March 4, 1968. 390 U. S. 942. Thereafter on May 27, 1968, this Court modified the order of March 4, 1968, "so as to limit the review in this Court to the constitutional validity of the search and seizure." ... U. S.

The jurisdiction of this Court rests on 28 U. S. C., § 1254 (1) and Rule 37 (c) of the Federal Rules of Criminal Procedure.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES OF COURT INVOLVED.

The constitutional provisions, statutes, and rules of court involved are the following:

Amendments to Constitution of the United States:

IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

V.

... nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . .

Statute of the United States:

18 U. S. Code, § 1952 (75 Stat. 498, amended 79 Stat. 212). Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

- (1) distribute the proceeds of any unlawful activity; or
- (2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than \$10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

Federal Rules of Criminal Procedure:

Rule 41. Search and seizure

(c) **Issuance and Contents.** A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may

direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned.

(d) **Execution and Return With Inventory.** The warrant may be executed and returned only within 10 days after its date. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The judge or commissioner shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(e) **Motion for Return of Property and to Suppress Evidence.** A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on

any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

QUESTIONS PRESENTED.

I.

Whether an affidavit of an F. B. I. agent in support of a search warrant and based upon information furnished by an unidentified informant is consistent with the Fourth Amendment to the Constitution of the United States and provides probable cause for issuance of the search warrant, even though it does not allege:

- A. underlying circumstances corroborating the information furnished by the informant, or
- B. proof of the credibility of the alleged informant himself with facts concerning his prior use and reliability, or
- C. facts showing that the informant spoke with personal knowledge, or
- D. the time when the informant learned his information and when he conveyed it to a colleague of the affiant, or
- E. all of the essential elements of the alleged offense, or
- F. facts as to the commission of a federal offense.

II.

Whether an officer, armed with a search warrant commanding him to search premises forthwith, may, after arriving at the premises to be searched, delay its execution for a period of time, without explanation as to the reason for such delay and, if the officer may delay, whether the officer must satisfactorily explain the reason for such delay or whether the person challenging the search must prove prejudice resulting from the delay.

III.

Whether the term "bookmaking paraphernalia" in a search warrant is sufficiently specific and particular to justify the seizure of an adding machine, pencil sharpener, blank bank deposit slips, radio, currency, glasses, watch, paper, pens, pencils, apartment lease, and telephones.

STATEMENT OF THE CASE.

Petitioner was tried by a jury and convicted in the United States District Court for the Eastern District of Missouri. He was sentenced to imprisonment for three years and a fine of \$5,000.00 (R. III 325). The indictment (R. I 1) charged that petitioner, between August 6, 1965 and August 18, 1965, traveled in interstate commerce from Illinois to Missouri with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment and carrying on of an unlawful activity, a business enterprise involving gambling in violation of Section 563.360 of the Missouri Revised Statutes, and that he thereafter performed and attempted to perform acts to promote, establish, carry on, and facilitate the promotion, management, establishment and carrying on of said unlawful activity, all in violation of Title 18, United States Code, Section 1952.

A search warrant (A. 6-7, R. II) issued by the United States Commissioner on August 18, 1965, authorized a search of Apartment F at 1108 Indian Circle Drive, Olivette, Missouri, and the seizure of property described as "bookmaking paraphernalia, scratch sheets, bet tabs, pay and collection sheets, bookmaking records, baseball schedules, books and records of bets received, accounts, bookmaker's ledger sheets, two telephones." An affidavit for the search warrant (A. 1-2, R. II) was executed by F. B. I. Special Agent Bender to which he attached his separate typed affidavit (A. 3-5, R. II).

The typed affidavit recited that petitioner had been seen on several occasions between August 6 and August 16, 1965, crossing bridges from Illinois to Missouri and on some occasions during that time at or in the vicinity of the subject apartment, that telephone company records reflected that there were two telephones in the apartment

under the name of Grace P. Hagen and bearing numbers WYdown 4-0029 and WYdown 4-0136, and that petitioner was known to law enforcement agents as a bookmaker, an associate of bookmakers, a gambler, and an associate of gamblers. The affidavit concluded: "The Federal Bureau of Investigation has been informed by a confidential reliable informant that William Spinelli is operating a handbook and accepting wagers and disseminating wagering information by means of the telephones which have been assigned the numbers WYdown 4-0029 and WYdown 4-0136."

After receiving the search warrant, F. B. I. agents arrived at the apartment building at approximately 4:55 P. M. on August 18, and waited in Apartment H (across the hall from Apartment F) until 7:05 P. M. No effort was made to enter the premises or to arrest petitioner between 4:55 and 7:05 P. M. (A. 14, R. I 55, R. III 155-166). At 7:05 petitioner left Apartment F, and the agents emerged from Apartment H and arrested him (A. 12-13, R. I 51, 62-64, R. III 144-145). A key taken from his pocket opened the door to Apartment F (R. I 57, R. III 146-147). Petitioner was taken downtown and booked while other officers remained on the premises and conducted a search (A. 12, R. I 49, R. III 147).

The items seized in the search consisted of pieces of paper, written notations, adding machine, pencil sharpener, radio, publications pertaining to baseball games, money, glasses, wrist watch, pens and pencils, lease, and five telephones. A list of the seized items was included in the return to the search warrant (A. 8-11, R. II).

The original indictment against petitioner was dismissed by the Government because it failed to allege any overt acts after the alleged travel in interstate commerce (R. II). After a new indictment, petitioner filed a motion to suppress evidence (R. I 12-13). Several agents testified at

a pre-trial hearing (R. I 37-78), after which the District Court overruled the motion to suppress evidence on the ground petitioner had no standing to protest the search (A. 16-17, R. I 88).

At the trial, evidence was admitted, over petitioner's objection, concerning petitioner's alleged participation in a handbook operation at another location seven or eight months prior to the time alleged in the indictment. With reference to the alleged handbook operation at 1108 Indian Circle Drive, the only evidence was the items seized on the search, which an F. B. I. Agent was permitted, over petitioner's objection, to identify as part of a handbook operation; there was no evidence of any bets placed with petitioner or of conduct of petitioner, other than his travels across the state line and his presence at or near the premises.

Petitioner appealed his conviction to the United States Court of Appeals for the Eighth Circuit (R. I 112-113).

On February 1, 1967, a decision was rendered reversing petitioner's conviction and remanding the proceedings to the District Court (R. V 21). Judge Heaney, with the concurrence of Judge Van Oosterhout, held that the affidavit on which the search warrant was issued did not provide the basis for probable cause (R. V 1-11). Judge Gibson dissented (R. V 12-20).

The Government filed a petition for rehearing en banc or in the alternative for a rehearing; which was granted and a rehearing was ordered before the Court en banc (R. IV 1). On July 31, 1967, the Court of Appeals en banc, by a 6-2 decision, affirmed the conviction (A. 17-18, R. IV 61) and withdrew the former opinion (R. V. 22). The majority opinion written by Judge Gibson ruled adversely to petitioner on a jurisdictional question as to the right of the Government to petition for rehearing and on all of peti-

tioner's other arguments (A. 19-56, R. IV 2-42). Judge Heaney, with the concurrence of Judge Van Oosterhout, wrote a dissenting opinion on the search question (A. 56-73, R. IV 42-60). (All of the opinions agreed that petitioner had standing to object to the search.)

Thereafter, petitioner's petition for rehearing (R. IV 62-71) was denied (R. IV 72). This petition for certiorari was duly filed on November 8, 1967, granted on March 4, 1968 (390 U. S. 942), and modified on May 27, 1968 (... U. S.).

SUMMARY OF ARGUMENT.

In accordance with the order of May 27, 1968, modifying the order granting the petition for certiorari, the review in this Court (and the argument in this Brief) is limited to the question of the constitutional validity of the search and seizure. As such, three of the questions originally presented are now in issue:

1. the validity of the search warrant;
2. the manner of its execution; and
3. the propriety of the seizure.

The search and seizure was constitutionally improper from start to finish, and the evidence seized should have been suppressed.

1. The search warrant was invalid because the affidavit in support thereof did not provide probable cause for its issuance. There were no underlying circumstances to corroborate the information of the alleged informant, whose credibility was not established. There was nothing presented to the Commissioner to show that the informant was a credible person or that his information was reliable. The affidavit was not based upon personal knowledge as to the information contained. It gave no time references as to the alleged information or when the informant learned of it or when he communicated such information to the affiant. The affidavit failed to allege all of the essential elements of a federal offense. For all of these reasons, the affidavit was defective and the search warrant was invalid.

2. Officers in possession of a search warrant requiring that it be executed forthwith do not have arbitrary authority to withhold its execution to some later time deemed by them, for some unexplained reason, to be more propitious

for its execution. No discretion is vested in the officer as to when he may execute the search warrant. If, however, it should be held that he does have discretion in the manner of execution, then the person complaining of the search ought not to have the burden of showing that he was prejudiced thereby, but the burden should be on the Government to prove harmless error.

3. A search warrant must specifically describe the property to be seized. If the term "gambling paraphernalia" includes items such as an adding machine, pencil sharpener, radio, money, glasses, watch, paper, pens and pencils, a lease and telephones, then it is too broad and vague and constitutes a general warrant condemned by the law.

ARGUMENT.

I.

The Affidavit in Support of the Search Warrant Did Not Provide Probable Cause for Issuance of the Search Warrant.

On August 18, 1965, the United States Commissioner issued a search warrant upon application of Robert L. Bender, Special Agent of the Federal Bureau of Investigation (A. 6-7, R. II). The printed form affidavit of Agent Bender stated that "he has reason to believe that" on the subject premises "there is now being concealed certain property . . . which are designed and intended for use, and which are or have been used as the means of committing a criminal offense, namely, violation of Section 1952, Title 18, United States Code" (A. 1-2, R. II). To this affidavit was attached a separate typed affidavit of Agent Bender, entitled "Affidavit in Support of Search Warrant" (A. 3-5, R. II).

This affidavit stated that on various designated dates between August 6 and August 16, 1965, petitioner was observed by the affiant or other agents crossing bridges from East St. Louis, Illinois, to St. Louis, Missouri, and on some occasions parking near or entering the subject premises; that telephone company records "reflect that there are two telephones located in" the subject premises under the name of Grace P. Hagen with numbers WYdown 4-0029 and WYdown 4-0136; that petitioner "is known to this affiant and to federal law enforcement agents and local law enforcement agents as a bookmaker, an associate of bookmakers, a gambler, and an associate of gamblers."

The affidavit concluded: "The Federal Bureau of Investigation has been informed by a confidential reliable

informant that William Spinelli is operating a handbook and accepting wagers and disseminating wagering information by means of the telephones which have been assigned the numbers WYdown 4-0029 and WYdown 4-0136" (A. 5).

The validity of the search warrant must be determined by the sufficiency of this affidavit. We believe the affidavit did not provide sufficient probable cause for the issuance of the search warrant.

A. No underlying circumstances.

The affidavit was insufficient because it failed to allege any underlying circumstances to corroborate the information allegedly furnished by the confidential informant. There was nothing presented to the Commissioner from which he could conclude that appellant was engaged in unlawful activities or that there was probable cause for the issuance of the search warrant. Interstate travel, visiting the apartment, two telephones, and a reputation do not constitute illegal conduct. The confidential information that petitioner "is operating a handbook and accepting wagers and disseminating wagering information" was uncorroborated. We believe the majority opinion below is in error in finding reasonable cause without such corroboration.

If the information in this affidavit is sufficient, then anyone with two telephones, or for that matter with one telephone, could be subjected to searches because he might be visited by an individual having a gambler's reputation, without any indication of wrongdoing other than the alleged word of an unidentified and uncorroborated informant. The Fourth Amendment commands greater protection to our citizenry. As said in *Aguilar v. Texas*, 378 U. S. 108, 114:

"Although an affidavit may be based on hearsay information and need not reflect the direct personal

observations of the affiant, *Jones v. United States*, 362 U. S. 257, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were . . ." (or here, that William Spinelli was operating a handbook, etc.).

In the Aguilar case, the affidavit stated that the officers had received reliable information from a credible person that narcotics were being stored. The language of the affidavit is almost identical to that in the instant affidavit. The language of the Aguilar opinion is equally applicable to the present case (l. c. 113-114):

"The vice in the present affidavit is at least as great as in *Nathanson* and *Giordenello*. Here the 'mere conclusion' that petitioner possessed narcotics (was operating a handbook) was not even that of the affiant himself, it was that of an unidentified informant. The affidavit here not only 'contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein', it does not even contain an 'affirmative allegation' that the affiant's unidentified source 'spoke with personal knowledge.' For all that appears, the source here merely suspected, believed or concluded that there were narcotics in petitioner's possession (that petitioner was operating a handbook). The magistrate here certainly could not 'judge for himself the persuasiveness of the facts relied on . . . to show possible cause.' He necessarily accepted 'without question' the informant's 'suspicion,' 'belief' or 'mere conclusion.' "

Compare the detail contained in the affidavit in *United States v. Ventresca*, 380 U. S. 102, in which the search warrant was sustained.

In *Riggan v. Virginia*, 384 U. S. 152, this Court in a per curiam order reversed the lower court judgment on the

authority of the Aguilar case. The dissenting opinion indicated the contents of the affidavit, which had far more detail than the affidavit in the present case.

We believe that the controlling rule of these cases is that if hearsay allegations originating from an unidentified informant are relied upon in an affidavit for a search warrant, the underlying circumstances supporting the allegations must be set forth, or the affidavit will be insufficient to show probable cause. The majority opinion below failed to follow this rule.

B. No credibility.

As stated in the Aguilar case, *supra*, at 114-115:

“... the magistrate must be informed of . . . some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see *Rugendorf v. United States*, 376 U. S. 528, was ‘credible’ or his information ‘reliable.’ Otherwise, ‘the inferences from the facts which lead to the complaint’ will be drawn not ‘by a neutral and detached magistrate,’ as the Constitution requires, but instead, by a police officer ‘engaged in the often competitive enterprise of ferreting out crime,’ *Giordenello v. United States*, *supra*, at 486; *Johnson v. United States*, *supra*, at 14, or as in this case, by an unidentified informant.”

Whether the requirements of a credible informant and reliable information are conjunctive or disjunctive is immaterial in the instant case because there is neither. As pointed out in part A hereof, the affidavit contained nothing to corroborate the information and to show that it was reliable. There was no specific detail furnished by the alleged informant and repeated in the affidavit concerning the operation of the alleged handbook. It was, at the most, an unsupported conclusion.

With reference to the credibility of the informant, there were no allegations to indicate any prior use of this informant. The affidavit stated that "the Federal Bureau of Investigation has been informed by a confidential reliable informant" of certain information. (It is significant that the agent who made the affidavit did not even allege that he had received this information—only that the F. B. I. had been informed. In fact, the testimony at the pre-trial hearing on the motion to suppress evidence (A. 11, R. I 47, 67) indicated that this information was conveyed to the affiant by another agent who supposedly obtained it from the unidentified informant.)

Without pointing out any underlying circumstances to corroborate the informant's credibility, the majority opinion below (A. 29, 32, R. IV 12, 16) draws comfort from its statement that the hearsay information came from one "sworn to be reliable." To say it is reliable does not make it so. There was nothing in the affidavit, nor anything presented to the Commissioner,² which proved the credibility of the informant, as required by the Aguilar and subsequent cases. There was nothing similar to the prior use of the informant which was found sufficient in *McGray v. Illinois*, 386 U. S. 300, and *United States ex rel. Rogers v. Warden*, 2 Cir., 381 F. 2d 209.

² The question of probable cause must necessarily be determined by the contents of the affidavit. Whether a United States Commissioner may receive oral testimony in addition to the affidavit (See *Gillespie v. United States*, 8 Cir., 368 F. 2d 1; cf. *Aguilar v. Texas*, 378 U. S. 108, fn. 1), need not be decided in this case, because there was no evidence that the Commissioner here considered anything other than the affidavit of Agent Bender. Bender testified that he saw petitioner at the bridge at 12:15 P. M. on August 18, 1965, and then went back to his office and prepared the affidavit for the search warrant and other documents which were presented to the Commissioner (R. I 59). Agent Bradley testified that he received the search warrant between one and two o'clock from the Commissioner (R. I 62). Obviously there was not much time for the Commissioner to conduct any sort of a hearing.

C. No personal knowledge.

As previously noted, the *Aguilar* case, quoting from *Giordenello v. United States*, 357 U. S. 480, 486, stated that the affidavit not only "contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein," but it did not even contain an affirmative allegation that the unidentified source spoke with personal knowledge. This deficiency is similarly apparent in the affidavit in this case, but the majority opinion below is silent as to this omission. There is nothing to indicate that the informant's conclusion as to petitioner's alleged illegal activity was based on the informant's personal knowledge, such as, by placing a wager, or personally receiving wagering information, or actually seeing the handbook in operation. And, of course, the affiant Bender had no such personal knowledge; in fact, he himself did not even receive the information directly from the informant. For all that appears from the affidavit, the informant could have repeated uncorroborated hearsay information which he could have received from someone not reliable.

D. No time.

The affidavit did not allege the time of the occurrence of the information furnished by the informant, or the time that he learned of it, or the time of receipt of such information by the Federal Bureau of Investigation. Here again the majority opinion is silent as to this omission. In *Rosencranz v. United States*, 1 Cir., 356 F. 2d 310, it was held that the use of the present tense was not sufficient to overcome the deficiency in failing to aver the time when the informant became aware of the law violation or the time when he conveyed this information to the affiant.

The omission of time is all the more significant in a proceeding involving Section 1952 of Title 18, U. S. C.,

because the overt act must occur after the travel. (As originally introduced, Section 1952 did not require a subsequent overt act, but Congress amended the law prior to adoption to require such an overt act. See sections relating to purposes of amendments in Senate Judiciary Committee Report No. 644, dated July 27, 1961, and House Judiciary Committee Report No. 966, dated August 17, 1961, and Conference Report No. 1161, dated September 11, 1961, 87th Congress, 1st Session.) There can be no inference here that any overt gambling acts upon which the affidavit was allegedly based took place after the interstate travel because at the time of the affidavit the Government was not even aware of the requirement of subsequent overt acts. The original indictment herein did not allege any overt acts, whether prior or subsequent. (See indictment which was dismissed in District Court Cause No. 65 Cr. 191 (1) in Record Volume II.)

E. No complete essential elements.

At the time of the issuance of the search warrant, petitioner was about to be arrested for violation of 18 U. S. C., § 1952. The search warrant, warrant of arrest and complaint specifically referred to this section, but at that time the Government was apparently not aware of what constituted all of the essential elements of the offense under Section 1952. The earlier indictment against petitioner was dismissed by the Government upon petitioner's motion and a new indictment on which petitioner was tried was obtained, because the original indictment omitted one of the basic elements of the offense, to-wit, the commission of an overt act after the alleged interstate travel with the requisite intent. The elements of the offense under Section 1952 are threefold: (1) interstate travel, (2) the requisite intent, and (3) overt acts after travel in furtherance of the unlawful activity. The affidavit of the F. B. I. Agent alleged the travel in inter-

state commerce but there was absolutely no allegation of the commission of an overt act after the travel. Thus, the affidavit was deficient because it failed to include all of the essential elements of the offense. The majority opinion below was silent as to this omission.

F. No federal offense.

Because of the failure to allege any overt acts subsequent to the interstate travel, the affidavit did not allege the commission of a federal crime, as required by *Thomas v. United States*, 5 Cir., 376 F. 2d 564. The majority opinion's references to "probable cause to believe the law was being violated" (A. 26, R. IV 10), and to "a sufficiently clear picture of a probable violation of the law" (A. 28, IV 12) could only be to a state law violation, if any. There being no description of the elements of an offense against the laws of the United States, the affidavit was deficient.

* * * * *

We have not attempted in this brief to repeat all of the arguments and authorities relied upon by Judge Heaney in his dissenting opinion in the Court of Appeals. We believe that the opinion, reported at 382 F. 2d 894 (A. 56, R. IV 42), is an excellent analysis of the applicable law and conclusively shows that the affidavit here was not sufficient to constitute probable cause for the issuance of a search warrant.

II.

The Search Warrant Was Not Executed ~~Forthwith~~.

Rule 41 (c) of the Federal Rules of Criminal Procedure provides that the search warrant "shall command the officer to search ~~forthwith~~ the person or place named for the property specified." The search warrant in this case directed the officer: "You are hereby commanded to

search forthwith the place named for the property specified . . ." (Emphasis supplied).

The evidence at the hearing on the motion to suppress evidence showed that the officers arrived at the apartment building at approximately 4:55 P. M., concealed themselves in an apartment across the hall, and waited until 7:05 P. M. when petitioner emerged from Apartment F (A. 12-14, R. I. 51, 53-54). When asked the reason for waiting two hours and ten minutes, Agent Bender stated: "Well, we wanted to observe Mr. Spinelli come out of Apartment F, the apartment in question, and consequently this was the only spot that we could utilize under the circumstances, and we did utilize the apartment, and we did see Mr. Spinelli come out of Apartment F" (A. 14, R. I. 54). He acknowledged that no effort was made to enter the premises either by force or invitation (A. 14, R. I. 55). This testimony was confirmed by Agent Bradley (R. I. 63-64).

The only federal case which we have found on this subject is *Mitchell v. United States*, D. C. Ct. App., 258 F. 2d 435, in which it was held that a search warrant issued five days prior to execution was valid. The majority opinion below cites the *Mitchell* case as authority that police officers are not invested "with the discretion to execute the warrant at any time within ten days believed by them to be the most advantageous" (A. 38, R. IV 22). But the majority opinion does not adhere to the views expressed by Judge Bazelon in the *Mitchell* case. In his concurring opinion, Judge Bazelon stated (l. c. 438):

" . . . (D)elay occasioned merely by the officer's assumption of authority to select the time of execution does vitiate the warrant. Even the magistrate has no right, once he has determined that the conditions for the issuance of a warrant are in existence, to

keep the suspect under surveillance and postpone execution of the warrant until such time as it may do the suspect the greatest harm."

After reviewing a number of state cases, Judge Bazelon concludes that the officer has no discretion to withhold the execution of the search warrant in order to wait for the best time to serve it, and that the warrant must be served as soon as possible after it has been issued.³

The majority opinion below refuses to equate "forth-with" with "immediately,"⁴ and speculates on possible reasons for the delay. But there was no explanation by the officers why they withheld executing the search warrant for two hours and ten minutes. They were at the premises to be searched, they had the search warrant, and they had the authority, if necessary, to break into and enter the premises. See 18 U. S. C., § 3109. That "evidence of gambling might well have been flushed down the commode before the officers could have forced their way into the apartment" would not excuse the giving of notice under § 3109 and is no justification for the delay here. To permit them to delay the execution until such time as they deemed proper gave the officers discretion which the search warrant and the Commissioner did not and could not give them.

³ In *Berger v. New York*, 388 U. S. 41, this Court, in discussing the electronic surveillance approved in *Osborn v. United States*, 385 U. S. 323, said at 57: "Moreover, the order was executed by the officer with dispatch, not over a prolonged and extended period." One of the deficiencies in the New York statute disapproved in *Berger* was that "(p)rompt execution is also avoided." At 59. Cf. *Katz v. United States*, 389 U. S. 347 (fn. 20): ". . . the concept of an 'incidental' search cannot readily be extended to include surreptitious surveillance of an individual either immediately before, or immediately after, his arrest."

⁴ Black's Law Dictionary, Fourth Edition, and Webster's New Collegiate Dictionary both give a first definition of "forth-with" as "immediately."

Perhaps the officers waited in hopes that they might personally hear incriminating conversations or see other persons arriving with other evidence so as to give them the probable cause which they did not previously have. (See Section I of this Argument.) Perhaps they delayed in order to create the issue as to whether petitioner later would have standing to move to suppress the evidence, an issue which swayed the trial Court (A. 16-17, R. I 88) but not the Court of Appeals (A. 24-26, R. IV 7-10). Perhaps they had some other unexplained reason for the delay.

We believe Judge Bazelon was anticipating just such circumstances when he stated in the Mitchell case (l. c. 437):

“There is danger, especially in cases like the present one where the establishment to be searched is claimed to be a scene of recurring law violations, that the officer . . . may seize property which came into existence after the warrant was issued.”

It is true that Rule 41 (d) states that “the warrant may be executed and returned only within ten days after its date.” We submit that this does not give discretion to the officer to delay the execution, but merely provides a maximum time during which the warrant retains its validity. There may be numerous reasons why a warrant cannot be executed within the ten-day period and thus becomes invalid. For example, the place to be searched may be mobile and not located by the officer, or an officer may not be readily available, or the warrant may have to be transmitted through the mail, or there may be weather conditions or other elements preventing immediate execution. But there is nothing in the Rule which gives any authority to an officer to delay the execution for no apparent reason once he is at the scene and has every facility available to execute the warrant, including

the right to break and enter.. As Judge Bazelon stated in the Mitchell case (l. c. 440):

"As I read the statute, ten days is the maximum allowable delay, even if circumstances make service impossible, but, if earlier service can be made, it must be made as soon as possible after the warrant has been issued."

The majority opinion below, without the citation of authority, would require the person complaining of the search to "point to some definite legal prejudice attributable to this unjustified delay." We submit that the burden ought not to be on the defendant to prove prejudice resulting from the unexplained delay. To require such of the defendant would create an unreasonable and probably impossible burden. It would open the door to unbridled abuse by officers of the constitutionally controlled area of searches and seizures.

In the related situation where the issue is one of probable cause, this Court has never required that prejudice be shown—only that the defendant have standing to contest the search. **Jones v. United States**, 362 U. S. 257. The burden of proving prejudice is not thrust upon the person objecting to the search where officers have improperly broken doors without giving the notice required by 18 U. S. C., § 3109 of their authority and purpose. **Miller v. United States**, 357 U. S. 301; **Wong Sun v. United States**, 371 U. S. 471; **Sabbath v. United States**, ... U. S. ..., decided June 3, 1968. Why should proof of prejudice be required where the officers enter belatedly and not where they enter prematurely?

An unreasonable search, whether because of the absence of probable cause or because of improprieties in the method of execution, is an important constitutional question. Where a violation of constitutional magnitude oc-

cers, we suggest that it is conclusively prejudicial. See **Davis v. United States**, 8 Cir., 247 F. 394, 398, and **Honig v. United States**, 8 Cir., 208 F. 2d 916, 921. At the very least, the burden should be upon the Government to prove beyond a reasonable doubt that the error was harmless. **Chapman v. California**, 386 U. S. 18, 24.

The search warrant here was not properly executed and the evidence should have been suppressed. To permit the search and seizure and to admit the evidence under these circumstances subjected petitioner to a search and seizure which was unreasonable and unlawful, in violation of his right to be secure against unreasonable searches and seizures guaranteed by the provisions of the Fourth Amendment to the Constitution of the United States, and in violation of his right not to be deprived of liberty or property without due process of law guaranteed by the provisions of the Fifth Amendment to the Constitution of the United States.

III.

The Officers Seized More Than the Search Warrant Authorized.

Rule 41 (c) of the Federal Rules of Criminal Procedure states that the search warrant "shall command the officer to search . . . for the property specified." The Fourth Amendment, as to search warrants, uses the language: "particularly describing the . . . things to be seized."

The property specified in the search warrant was "bookmaking paraphernalia, scratch sheets, bet tabs, pay and collection sheets, bookmaking records, baseball schedules, books and records of bets received, accounts, bookmaker's ledger sheets, two telephones." Among the items seized, according to the inventory made by the searching officers, were the following: Underwood Adding Machine in brown

case (Pl. Ex. 44, R. III 179, 242), pencil sharpener (Pl. Ex. 50, R. III 180, 242), stack of blank deposit tickets on State Bank of Wellston (not suppressed on motion to suppress but not introduced by government), G. E. AM-FM radio (Pl. Ex. 47, R. III 180, 242), \$22.00 in currency (Pl. Ex. 38, R. III 176, 242), a pair of glasses (Pl. Ex. 51, R. III 191, 242), Timex watch (Pl. Ex. 52, R. III 191, 242), pads of graph paper (not suppressed, not introduced), four pens and two pencils (Pl. Ex. 45, R. III 179, 242), lease of premises (Pl. Ex. 46, R. III 179, 242), and five telephones (Pl. Ex. 40, 41, 42, 43, R. III 177, 178, 242).

We submit that these seized items do not fall within any of the categories specified in the search warrant. To characterize them as "bookmaking paraphernalia," as was done by the majority opinion below, gives an unnecessarily broad definition to that vague term, contrary to the command of Rule 41 (c) and the Fourth Amendment. In effect, it gave unlimited authority to the searching officers to seize anything they desired under a general warrant. See **Marron v. United States**, 275 U. S. 192, and **Stanford v. Texas**, 379 U. S. 476. If "bookmaking paraphernalia" can be so broadly construed, then there would be no necessity to specify the other items particularized in the search warrant. Is it not anomalous to describe two telephones in the search warrant and, when the officers seize five, to hold that the additional three are not telephones but "bookmaking paraphernalia"?

Because the seized items were not specified or described in the search warrant, they were improperly seized. They should have been suppressed under the provisions of Rule 41 (e) (3) which provides that a person may move the District Court "to suppress for use as evidence anything so obtained on the ground that . . . (3) the property seized is not that described in the warrant."

CONCLUSION.

For the foregoing reasons, the search and seizure was constitutionally invalid. The District Court should have sustained petitioner's motion to suppress the evidence.

Accordingly, the judgment below should be reversed and the case remanded to the United States District Court for the Eastern District of Missouri, with directions to sustain petitioner's motion to suppress evidence.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 8.—October Term, 1968.

William Spinelli, Petitioner, v. United States. } On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[January 27, 1969.]

MR. JUSTICE HARLAN delivered the opinion of the Court.

William Spinelli was convicted under 18 U. S. C. § 1952¹ of traveling to St. Louis, Missouri, from a nearby Illinois suburb with the intention of conducting gambling activities proscribed by Missouri law. See Mo. Rev. Stat. § 563.360 (1959). At every appropriate stage in the proceedings in the lower courts, the petitioner challenged the constitutionality of the warrant which authorized the FBI search that uncovered the evidence necessary for his conviction. At each stage, Spinelli's challenge was treated in a different way. At a pretrial suppression hearing, the United States District Court for the Eastern District of Missouri held that Spinelli lacked standing to raise a Fourth Amendment objection. A unanimous panel of the Court of Appeals for the

¹ The relevant portion of the statute reads:

"(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate commerce . . . with intent to—

"(3) otherwise promote, manage, establish, carry on . . . any unlawful activity, . . . and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than \$10,000 or imprisoned for not more than five years, or both.

"(b) As used in the section 'unlawful activity' means (1) any business enterprise involving gambling . . . in violation of the laws of the State in which they are committed or of the United States . . ."

Eighth Circuit rejected the District Court's ground, a majority holding further that the warrant was issued without probable cause. After an *en banc* rehearing, the Court of Appeals sustained the warrant and affirmed the conviction by a vote of six to two. — F. 2d —. Both the majority and dissenting *en banc* opinions reflect a most conscientious effort to apply the principles we announced in *Aguilar v. Texas*, 378 U. S. 108 (1964), to a factual situation whose basic characteristics have not been at all uncommon in recent search warrant cases. Believing it desirable that the principles of *Aguilar* should be further explicated, we granted certiorari, 390 U. S. 942, our writ being later limited to the question of the constitutional validity of the search and seizure.² — U. S. —. For reasons that follow we reverse.

In *Aguilar*, a search warrant had issued upon an affidavit of police officers who swore only that they had "received reliable information from a credible person and do believe" that narcotics were being illegally stored on the described premises. While recognizing that the constitutional requirement of probable cause can be satisfied by hearsay information, this Court held the affidavit inadequate for two reasons. First, the application failed to set forth any of the "underlying circum-

² We agree with the Court of Appeals that Spinelli has standing to raise his Fourth Amendment claim. The issue arises because at the time the FBI searched the apartment in which Spinelli was alleged to be conducting his bookmaking operation, the petitioner was not on the premises. Instead, the agents did not execute their search warrant until Spinelli was seen to leave the apartment, lock the door, and enter the hallway. At that point, petitioner was arrested; the key to the apartment was demanded of him, and the search commenced. Since petitioner would plainly have standing if he had been arrested inside the apartment, *Jones v. United States*, 362 U. S. 257, 267 (1960), it cannot matter that the agents preferred to delay the arrest until petitioner stepped into the hallway—especially when the FBI only managed to gain entry into the apartment by requiring petitioner to surrender his key.

stances" necessary to enable the magistrate independently to judge of the validity of the informant's conclusion that the narcotics were where he said they were. Second, the affiant-officers did not attempt to support their claim that their informant was "'credible' or his information 'reliable.'" The Government is, however, quite right in saying that the FBI affidavit in the present case is more ample than that in *Aguilar*. Not only does it contain a report from an anonymous informant, but it also contains a report of an independent FBI investigation which is said to corroborate the informant's tip. We are, then, required to delineate the manner in which *Aguilar*'s two-pronged test should be applied in these circumstances.

In essence, the affidavit, reproduced in full in the Appendix to this opinion, contained the following allegations:³

1. The FBI had kept track of Spinelli's movements on five days during the month of August 1965. On four of these occasions, Spinelli was seen crossing one of two bridges leading from Illinois into St. Louis, Missouri, between 11 a. m. and 12:15 p. m. On four of the five days, Spinelli was also seen parking his car in a lot used by residents of an apartment house at 1108 Indian Circle Drive in St. Louis, between 3:30 p. m. and 4:45 p. m.⁴

³ It is, of course, of no consequence that the agents might have had additional information which could have been given to the Commissioner. "It is elementary that in passing on the validity of the warrant, the reviewing court may consider *only* information brought to the magistrate's attention." *Aguilar v. Texas*, 378 U. S. 108, 109, n. 1 (emphasis in original). Since the Government does not argue that whatever additional information the agents may have possessed was sufficient to provide probable cause for the arrest, thereby justifying the resultant search as well, we need not consider that question.

⁴ No report was made as to Spinelli's movements during the period between his arrival in St. Louis at noon and his arrival at the parking lot in the late afternoon. In fact, the evidence at trial indicated that Spinelli frequented the offices of his stockbroker during this period.

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On one day, Spinelli was followed further and seen to enter a particular apartment in the building.

2. An FBI check with the telephone company revealed that this apartment contained two telephones listed under the name of Grace P. Hagen, and carrying the numbers WYdown 4-0029 and WYdown 4-0136.

3. The application stated that "William Spinelli is known to this affiant and to federal law enforcement agents and local law enforcement agents as a bookmaker, an associate of bookmakers, a gambler, and an associate of gamblers."

4. Finally, it was stated that the FBI "has been informed by a confidential reliable informant that William Spinelli is operating a handbook and accepting wagers and disseminating wagering information by means of the telephones which have been assigned the numbers, WYdown 4-0029 and WYdown 4-0136."

There can be no question that the last item mentioned, detailing the informant's tip, has a fundamental place in this warrant application. Without it, probable cause could not be established. The first two items reflect only innocent-seeming activity and data. Spinelli's travels to and from the apartment building and his entry into a particular apartment on one occasion could hardly be taken as bespeaking gambling activity; and there is surely nothing unusual about an apartment containing two separate telephones. Many a householder indulges himself in this petty luxury. Finally, the allegation that Spinelli was "known" to the affiant and to other federal and local law enforcement officers as a gambler and an associate of gamblers is but a bald and unilluminating assertion of suspicion that is entitled to no weight in appraising the magistrate's decision. *Nathanson v. United States*, 290 U. S. 41, 46 (1933).

So much indeed the Government does not deny. Rather, following the reasoning of the Court of Appeals, the Government claims that the informant's tip gives

a suspicious color to the FBI's reports detailing Spinelli's innocent-seeming conduct and that, conversely, the FBI's surveillance corroborates the informant's tip, thereby entitling it to more weight. It is true, of course, that the magistrate is obligated to render a judgment based upon a common-sense reading of the entire affidavit. *United States v. Ventresca*, 380 U. S. 102, 108 (1964). We believe, however, that the "totality of circumstances" approach taken by the Court of Appeals paints with too broad a brush. Where, as here, the informer's tip is a necessary element in a finding of probable cause, its proper weight must be determined by a more precise analysis.

The informer's report must first be measured against *Aguilar*'s standards so that its probative value can be assessed. If the tip is found inadequate under *Aguilar*, the other allegations which corroborate the information contained in the hearsay report should then be considered. At this stage as well, however, the standards enunciated in *Aguilar* must inform the magistrate's decision. He must ask: Can it fairly be said that the tip, even when certain parts of it have been corroborated by independent sources, is as trustworthy as a tip which would pass *Aguilar*'s tests without independent corroboration? *Aguilar* is relevant at this stage of the inquiry as well because the tests it establishes were designed to implement the long-standing principle that probable cause must be determined by a "neutral and detached magistrate," and not by "the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U. S. 10, 14 (1948). A magistrate cannot be said to have properly discharged his constitutional duty if he relies on an informer's tip which—even when partially corroborated—is not as reliable as one which passes *Aguilar*'s requirements when standing alone.

Applying these principles to the present case, we first consider the weight to be given the informer's tip when

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it is considered apart from the rest of the affidavit. It is clear that a Commissioner could not credit it without abdicating his constitutional function. Though the affiant swore that his confidant was "reliable," he offered the magistrate no reason in support of this conclusion. Perhaps even more important is the fact that *Aguilar's* other test has not been satisfied. The tip does not contain a sufficient statement of the underlying circumstances from which the informer concluded that Spinelli was running a bookmaking operation. We are not told how the FBI's source received his information—it is not alleged that the informant personally observed Spinelli at work or that he had ever placed a bet with him. Moreover, if the informant came by the information indirectly, he did not explain why his sources were reliable. Compare *Jaben v. United States*, 381 U. S. 214 (1965). In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail so that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation.

The detail provided by the informant in *Draper v. United States*, 358 U. S. 307 (1959), provides a suitable benchmark. While Hereford, the FBI's informer in that case, did not state the way in which he had obtained his information, he reported that Draper had gone to Chicago the day before by train and that he would return to Denver by train with three ounces of heroin on one of two specified mornings. Moreover, Hereford went on to describe, with minute particularity, the clothes that Draper would be wearing upon his arrival at the Denver station. A magistrate, when confronted with such detail, could reasonably infer that the informant had gained

his information in a reliable way.⁸ Such an inference cannot be made in the present case. Here, the only facts supplied were that Spinelli was using two specified telephones and that these phones were being used in gambling operations. This meager report could easily have been obtained from an offhand remark heard at a neighborhood bar.

Nor do we believe that the patent doubts *Aguilar* raises as to the report's reliability are adequately resolved by a consideration of the allegations detailing the FBI's independent investigative efforts. At most, these allegations indicated that Spinelli could have used the telephones specified by the informant for some purpose. This cannot by itself be said to support both the inference that the informer was generally trustworthy and that he had made his charge against Spinelli on the basis of information obtained in a reliable way. Once again, *Draper* provides a relevant comparison. Independent police work in that case corroborated much more than one small detail that had been provided by the informant. There, the police, upon greeting the inbound Denver train on the second morning specified by informer Hereford, saw a man whose dress corresponded precisely to Hereford's detailed description. It was then apparent that the informant had not been fabricating his report out of whole cloth; since the report was of the sort which in common experience may be recognized as having been obtained in a reliable way, it was perfectly clear that probable cause had been established.

We conclude, then, that in the present case the informant's tip—even when corroborated to the extent indi-

⁸ While *Draper* involved the question whether the police had probable cause for an arrest without a warrant, the analysis required for an answer to this question is basically similar to that demanded of a magistrate when he considers whether a search warrant should issue.

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cated—was not sufficient to provide the basis for a finding of probable cause. This is not to say that the tip was so insubstantial that it could not properly have counted in the magistrate's determination. Rather, it needed some further support. When we look to the other parts of the application, however, we find nothing alleged which would permit the suspicions engendered by the informant's report to ripen into a judgment that a crime was probably being committed. As we have already seen, the allegations detailing the FBI's surveillance of Spinelli and its investigation of the telephone company records contain no suggestion of criminal conduct when taken by themselves—and they are not endowed with an aura of suspicion by virtue of the informer's tip. Nor do we find that the FBI's reports take on a sinister color when read in light of common knowledge that bookmaking is often carried on over the telephone and from premises ostensibly used by others for perfectly normal purposes. Such an argument would carry weight in a situation in which the premises contain an unusual number of telephones or abnormal activity is observed, cf. *McCray v. Illinois*, 386 U. S. 300, 302 (1967), but it does not fit this case where neither of these factors is present.⁸ All that remains to be considered is the flat statement that Spinelli was "known" to the FBI and others as a gambler. But just as a simple assertion of police suspicion is not itself a sufficient basis for a magistrate's finding of probable cause, we do not believe it may be used to give additional weight to allegations that would otherwise be insufficient.

The affidavit, then, falls short of the standards set forth in *Aguilar*, *Draper*, and our other decisions that give content to the notion of probable cause.⁹ In hold-

⁸ A box containing three uninstalled telephones was found in the apartment, but only after execution of the search warrant.

⁹ In those cases in which this Court has found probable cause established, the showing made was much more substantial than the

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ing as we have done, we do not retreat from the established propositions that only the probability, and not a *prima facie* showing, of criminal activity is the standard of probable cause, *Beck v. Ohio*, 379 U. S. 89, 96 (1964); that affidavits of probable cause are tested by much less rigorous standards than those governing the admissibility of evidence at trial, *McCray v. Illinois*, 386 U. S. 300, 311 (1967); that in judging probable cause issuing magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense, *United States v. Ventresca*, 380 U. S. 102, 108 (1964); and that their determination of probable cause should be paid great deference by reviewing courts, *Jones v. United States*, 362 U. S. 257, 270-271 (1960). But we cannot sustain this warrant without diluting important safeguards that assure that the judgment of a disinterested judicial officer will interpose itself between the police and the citizenry.*

The judgment of the Court of Appeals is reversed and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

one made here. Thus, in *United States v. Ventresca*, 380 U. S. 102, 104 (1965), FBI agents observed repeated deliveries of loads of sugar in 60-pound bags, smelled the odor of fermenting mash, and heard "sounds similar to that of a motor or a pump coming from the direction of" Ventresca's house." Again, in *McCray v. Illinois*, 386 U. S. 300, 303-304 (1967), the informant reported that McCray "was selling narcotics and had narcotics on his person now in the vicinity of 47th and Calumet." When the police arrived at the intersection, they observed McCray engaging in various suspicious activities. 386 U. S., at 302.

* In the view we have taken of this case, it becomes unnecessary to decide whether the search warrant was properly executed, or whether it sufficiently described the things that were seized.

APPENDIX.

AFFIDAVIT IN SUPPORT OF SEARCH WARRANT.

I, Robert L. Bender, being duly sworn, depose and say that I am a Special Agent of the Federal Bureau of Investigation, and as such am authorized to make searches and seizures.

That on August 6, 1965, at approximately 11:44 a. m., William Spinelli was observed by an Agent of the Federal Bureau of Investigation driving a 1964 Ford Convertible, Missouri license HC3-649, onto the Eastern approach of the Veterans Bridge leading from East St. Louis, Illinois, to St. Louis, Missouri.

That on August 11, 1965, at approximately 11:16 a. m., William Spinelli was observed by an Agent of the Federal Bureau of Investigation driving a 1964 Ford convertible, Missouri license HC3-649, onto the Eastern approach of the Eads Bridge leading from East St. Louis, Illinois, to St. Louis, Missouri.

Further, at approximately 11:18 a. m. on August 11, 1965, I observed William Spinelli driving the aforesaid Ford convertible from the Western approach of the Eads Bridge into St. Louis, Missouri.

Further, at approximately 4:40 p. m. on August 11, 1965, I observed the aforesaid Ford convertible, bearing Missouri license HC3-649, parked in a parking lot used by residents of The Chieftain Manor Apartments, approximately one block east of 1108 Indian Circle Drive.

On August 12, 1965, at approximately 12:07 p. m. William Spinelli was observed by an Agent of the Federal Bureau of Investigation driving the aforesaid 1964 Ford convertible onto the Eastern approach of the Veterans Bridge from East St. Louis, Illinois, in the direction of St. Louis, Missouri.

Further, on August 12, 1965, at approximately 3:46 p. m., I observed William Spinelli driving the aforesaid

1964 Ford convertible onto the parking lot used by the residents of The Chieftain Manor Apartments approximately one block east of 1108 Indian Circle Drive.

Further, on August 12, 1965, at approximately 3:49 p. m., William Spinelli was observed by an Agent of the Federal Bureau of Investigation entering the front entrance of the two-story apartment building located at 1108 Indian Circle Drive, this building being one of The Chieftain Manor Apartments.

On August 13, 1965, at approximately 11:08 a. m., William Spinelli was observed by an Agent of the Federal Bureau of Investigation driving the aforesaid Ford convertible onto the Eastern approach of the Eads Bridge from East St. Louis, Illinois, heading towards St. Louis, Missouri.

Further, on August 13, 1965, at approximately 11:11 a. m., I observed William Spinelli driving the aforesaid Ford convertible from the Western approach of the Eads Bridge into St. Louis, Missouri.

Further, on August 13, 1965, at approximately 3:45 p. m., I observed William Spinelli driving the aforesaid 1964 Ford convertible onto the parking area used by residents of The Chieftain Manor Apartments, said parking area being approximately one block from 1108 Indian Circle Drive.

Further, on August 13, 1965, at approximately 3:55 p. m., William Spinelli was observed by an Agent of the Federal Bureau of Investigation entering the corner apartment located on the second floor in the southwest corner, known as Apartment F, of the two-story apartment building known and numbered as 1108 Indian Circle Drive.

On August 16, 1965, at approximately 3:22 p. m., I observed William Spinelli driving the aforesaid Ford convertible onto the parking lot used by the residents of The Chieftain Manor Apartments approximately one block east of 1108 Indian Circle Drive.

Further, an Agent of the F. B. I. observed William Spinelli alight from the aforesaid Ford convertible and walk toward the apartment building located at 1108 Indian Circle Drive.

The records of the Southwestern Bell Telephone Company reflect that there are two telephones located in the southwest corner apartment on the second floor of the apartment building located at 1108 Indian Circle Drive under the name of Grace P. Hagen. The numbers listed in the Southwestern Bell Telephone Company records for the aforesaid telephones are WYdown 4-0029 and WYdown 4-0136.

William Spinelli is known to this affiant and to federal law enforcement agents and local law enforcement agents as a bookmaker, an associate of bookmakers, a gambler, and an associate of gamblers.

The Federal Bureau of Investigation has been informed by a confidential reliable informant that William Spinelli is operating a handbook and accepting wagers and disseminating wagering information by means of the telephones which have been assigned the numbers WYdown 4-0029 and WYdown 4-0136.

/s/ Robert L. Bender,
Robert L. Bender,
Special Agent Federal Bureau
of Investigation.

Subscribed and sworn to before me this 18th day of August, 1965, at St. Louis, Missouri.

/s/ William R. O'Toole.

SUPREME COURT OF THE UNITED STATES

No. 8—OCTOBER TERM, 1968.

William Spinelli, Petitioner,
v.
United States. On Writ of Certiorari to
the United States Court
of Appeals for the Eighth
Circuit.

[January 27, 1969.]

MR. JUSTICE WHITE, concurring.

An investigator's affidavit that he has seen gambling equipment being moved into a house at a specified address will support the issuance of a search warrant. The oath affirms the honesty of the statement and negatives the lie or imagination. Personal observation attests to the facts asserted—that there is gambling equipment on the premises at the named address.

But if the officer simply avers, without more, that there is gambling paraphernalia on certain premises, the warrant should not issue, even though the belief of the officer is an honest one, as evidenced by his oath, and even though the magistrate knows him to be an experienced, intelligent officer who has been reliable in the past. This much was settled in *Nathanson v. United States*, 290 U. S. 41 (1933), where the Court held insufficient an officer's affidavit swearing he had cause to believe that there was illegal liquor on the premises for which the warrant was sought. The unsupported assertion or belief of the officer does not satisfy the requirement of probable cause. *Jones v. United States*, 362 U. S. 257, 269. (1960); *Grau v. United States*, 287 U. S. 124 (1932); *Byars v. United States*, 273 U. S. 28, 29 (1927).

What is missing in *Nathanson* and like cases is a statement of the basis for the affiant's believing the facts contained in the affidavit—the good "cause" which the officer

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in *Nathanson* said he had. If an officer swears that there is gambling equipment at a certain address, the possibilities are (1) that he has seen the equipment; (2) that he has observed or perceived facts from which the presence of the equipment may reasonably be inferred; and (3) that he has obtained the information from someone else. If (1) is true, the affidavit is good. But in (2), the affidavit is insufficient unless the perceived facts are given, for it is the magistrate, not the officer, who is to judge the existence of probable cause. *Aguilar v. Texas*, 378 U. S. 108 (1964); *Giordenello v. United States*, 357 U. S. 480, 486 (1958); *Johnson v. United States*, 333 U. S. 10, 14 (1947). With respect to (3), where the officer's information is hearsay, no warrant should issue absent good cause for crediting that hearsay. Because an affidavit asserting, without more, the location of gambling equipment at a particular address does not claim personal observation of any of the facts by the officer, and because of the likelihood that the information came from an unidentified third party, affidavits of this type are unacceptable.

Neither should the warrant issue if the officer states that there is gambling equipment in a particular apartment and that his information comes from an informant, named or unnamed, since the honesty of the informant and the basis for his report are unknown. Nor would the missing elements be completely supplied by the officer's oath that the informant has often furnished reliable information in the past. This attests to the honesty of the informant, but *Aguilar v. Texas*, *supra*, requires something more—did the information come from observation, or did the informant in turn receive it from another? Absent additional facts for believing the informant's report, his assertion stands no better than the oath of the officer to the same effect. Indeed, if the affidavit of an officer, known by the magistrate

to be honest and experienced, stating that gambling equipment is located in a certain building is unacceptable, it would be quixotic if a similar statement from an honest informant were found to furnish probable cause. A strong argument can be made that both should be acceptable under the Fourth Amendment, but under our cases neither is. The past reliability of the informant can no more furnish probable cause for believing his current report than can previous experience with the officer himself.

If the affidavit rests on hearsay—an informant's report—what is necessary under *Aguilar* is one of two things: the informant must declare either (1) that he has himself seen or perceived the fact or facts asserted; or (2) that his information is hearsay, but there is good reason for believing it—perhaps one of the usual grounds for crediting hearsay information. The first presents few problems: since the report, although hearsay, purports to be first-hand observation, remaining doubt centers on the honesty of the informant, and that worry is dissipated by the officer's previous experience with the informant. The other basis for accepting the informant's report is more complicated. But if, for example, the informer's hearsay comes from one of the actors in the crime in the nature of admission against interest, the affidavit giving this information should be held sufficient.

I am inclined to agree with the majority that there are limited special circumstances in which an "honest" informant's report, if sufficiently detailed, will in effect verify itself—that is, the magistrate when confronted with such detail could reasonably infer that the informant had gained his information in a reliable way. See *ante*, at 7. Detailed information may sometimes imply that the informant himself has observed the facts. Suppose an informant with whom an officer has had satis-

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factory experience states that there is gambling equipment in the living room of a specified apartment and describes in detail not only the equipment itself but the appointments and furnishings in the apartment. Detail like this, if true at all, must rest on personal observation of either the informant or of someone else. If the latter, we know nothing of the third person's honesty or sources; he may be fabricating a wholly false report. But it is arguable that on these facts it was the informant himself who has perceived the facts, for the information reported is not usually the subject of casual, day-to-day conversation. Because the informant is honest and it is probable that he has viewed the facts, there is probable cause for the issuance of a warrant.

So too in the special circumstances of *Draper v. United States*, 358 U. S. 307 (1959), the kind of information related by the informant is not generally sent ahead of a person's arrival in a city except to those who are intimately connected with making careful arrangements for meeting him. The informant, posited as honest, somehow had the reported facts, very likely from one of the actors in the plan, or as one of them himself. The majority's suggestion is that a warrant could have been obtained based only on the informer's report. I am inclined to agree, although it seems quite plain that if it may be so easily inferred from the affidavit that the informant has himself observed the facts or has them from an actor in the event, no possible harm could come from requiring a statement to that effect, thereby removing the difficult and recurring questions which arise in such situations.

Of course, *Draper* itself did not proceed on this basis. Instead, the Court pointed out that when the officer saw a person getting off the train at the specified time, dressed and conducting himself precisely as the informant had predicted, all but the critical fact with respect to pos-

sesing narcotics had then been verified and for that reason the officer had "reasonable grounds" to believe also that Draper was carrying narcotics. Unquestionably, verification of arrival time, dress and gait reinforced the honesty of the informant—he had not reported a made up story. But if what Draper stands for is that the existence of the tenth and critical fact is made sufficiently probable to justify the issuance of a warrant by verifying nine other facts coming from the same source, I have my doubts about that case.

In the first place, the proposition is not that the tenth fact may be logically inferred from the other nine or that the tenth fact is usually found in conjunction with the other nine. No one would suggest that just anyone getting off the 10:30 train dressed as Draper was, with a brisk walk and carrying a zipper bag, should be arrested for carrying narcotics. The thrust of Draper is not that the verified facts have independent significance with respect to proof of the tenth. The argument instead relates to the reliability of the source: because an informant is right about some things, he is more probably right about other facts, usually the critical, unverified facts.

But the Court's cases have already rejected for Fourth Amendment purposes the notion that the past reliability of an officer is sufficient reason for believing his current assertions. Nor would it suffice, I suppose, if a reliable informant states there is gambling equipment in Apartment 607 and then proceeds to describe in detail Apartment 201, a description which is verified before applying for the warrant. He was right about 201, but that hardly makes him more believable about the equipment in 607. But what if he states that there are narcotics locked in a safe in Apartment 300, which is described in detail, and the apartment manager verifies everything but the contents of the safe? I doubt that the report about the narcotics is made appreciably more believable

by the verification. The informant could still have gotten his information concerning the safe from others about whom nothing is known or could have inferred the presence of narcotics from circumstances which a magistrate would find unacceptable.

The tension between *Draper* and the *Nathanson-Aytilor* line of cases is evident from the course followed by the majority opinion. First, it is held that the report from a reliable informant that Spinelli is using two telephones with specified numbers to conduct a gambling business plus Spinelli's reputation in police circles as a gambler does not add up to probable cause. This is wholly consistent with *Aytilor* and *Nathanson*: the informant did not reveal whether he had personally observed the facts or heard them from another, and if the latter, no basis for crediting the hearsay was presented. Nor were the facts, as Mr. Justice HARLAN says, of such a nature that they normally would be obtainable only by the personal observation of the informant himself. The police, however, did not stop with the informant's report. Independently, they established the existence of two phones having the given numbers and located them in an apartment house which Spinelli was regularly frequenting away from his home. There remained little question but that Spinelli was using the phones, and it was a fair inference that the use was not for domestic but for business purposes. The informant had claimed the business involved gambling. Since his specific information about Spinelli using two phones with particular numbers had been verified, did not his allegation about gambling thereby become sufficiently more believable if the *Draper* principle is to be given any scope at all? I would think so, particularly since the information from the informant which was verified was not neutral, irrelevant information but was material to proving the gambling allegation: two phones with dif-

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ferent numbers in an apartment used away from home indicates a business use in an operation, like bookmaking, where multiple phones are needed. The *Dreper* approach would reasonably justify the issuance of a warrant in this case, particularly since the police had some awareness of Spinelli's past activities. The majority, however, while seemingly embracing *Dreper*, confines that case to its own facts. Pending full scale reconsideration of that case, on the one hand, or of the *Nathanson-Aguilar* cases on the other, I join the opinion of the Court and the judgment of reversal, especially since a vote to affirm would produce an equally divided Court.

THE CROWN OF JEWELS

mentum nostrum quatenus bonis membris regis et non est extenuata tunc
quidam auctoritatem vel potestim patrum vel auctoritatem a nobis vel ipsius
qui regit. sed etiam deinde auctoritatem regit. auctoritatem regit
tunc et hoc est auctoritas sicut etiam regit membris regis. auctoritatem regit
tunc et hoc est auctoritas sicut etiam regit membris regis.

SUPREME COURT OF THE UNITED STATES

No. 8.—OCTOBER TERM, 1968.

William Spinelli, Petitioner, | On Writ of Certiorari to
v. | the United States Court
United States. | of Appeals for the Eighth
Circuit.

[January 27, 1969.]

MR. JUSTICE BLACK, dissenting.

In my view, this Court's decision in *Aguilar v. Texas*, 378 U. S. 108 (1964), was bad enough. That decision went very far toward elevating the magistrate's hearing for issuance of a search warrant to a full-fledged trial, where witnesses must be brought forward to attest personally to all the facts alleged. But not content with this, the Court today expands *Aguilar* to almost unbelievable proportions. Of course, it would strengthen the probable cause presentation if eyewitnesses could testify that they saw the defendant commit the crime. It would be stronger still if these witnesses could explain in detail the nature of the sensual perceptions on which they based their "conclusion" that the person they had seen was the defendant and that he was responsible for the events they observed. Nothing in our Constitution, however, requires that the facts be established with that degree of certainty and with such elaborate specificity before a policeman can be authorized by a disinterested magistrate to conduct a carefully limited search.

The Fourth Amendment provides that "no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." In this case a search warrant was issued supported by an

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oath and particularly describing the place to be searched and the things to be seized. The supporting oath was three printed pages and the full text of it is included in an Appendix to the Court's opinion. The magistrate, I think properly, held the information set forth sufficient facts to show "probable cause" that the defendant was violating the law. Six members of the Court of Appeals also agreed that the affidavit was sufficient to show probable cause. A majority of this Court today holds, however, that the magistrate and all of these judges were wrong. In doing so, they substitute their own opinion for that of the local magistrate and the circuit judges, and reject the *en banc* factual conclusion of the Eighth Circuit and reverse the judgment based upon that factual conclusion. I cannot join in any such disposition of an issue so vital to the administration of justice, and dissent as vigorously as I can.

I repeat my belief that the affidavit given the magistrate was more than ample to show probable cause of the defendant's guilt. The affidavit meticulously set out facts sufficient to show the following:

1. The defendant had been shown going to and coming from a room in an apartment which contained two telephones listed under the name of another person. Nothing in the record indicates that the apartment was of that large and luxurious type which could only be occupied by a person to whom it would be a "petty luxury" to have two separate telephones, with different numbers, both listed under the name of a person who did not live there.

2. The defendant's car had been observed parked in the apartment's parking lot. This fact was, of course, highly relevant in showing that the defendant was extremely interested in some enterprise which was located in the apartment.

3. The FBI had been informed by a reliable informant that the defendant was accepting wagering information by telephones—the particular telephones located in the apartment the defendant had been repeatedly visiting. Unless the Court, going beyond the requirements of the Fourth Amendment, wishes to require magistrates to hold trials before issuing warrants, it is not necessary—as the Court holds—to have the affiant explain "the underlying circumstances from which the informer concluded that Spinelli was running a bookmaking operation." *Ante*, p. 6.

4. The defendant was known by federal and local law enforcement agents as a bookmaker and an associate of gamblers. I cannot agree with the Court that this knowledge was only a "bald and unilluminating assertion of suspicion that is entitled to no weight in the magistrate's decision." *Ante*, p. 4. Although the statement is hearsay that might not be admissible in a regular trial, everyone knows, unless he shuts his eyes to the realities of life, that this is a relevant fact which, together with other circumstances, might indicate a factual probability that gambling is taking place.

The foregoing facts should be enough to constitute probable cause for anyone who does not believe that the only way to obtain a search warrant is to prove beyond a reasonable doubt that a defendant is guilty. Even *Aguilar*, on which the Court relies, cannot support the contrary result, at least as that decision was written before today's massive escalation of it. In *Aguilar* the Court dealt with an affidavit that stated only:

"Affiants have received reliable information from a credible person and do believe that heroin . . . and other narcotics are being kept at the above described premises for the purposes of sale and use contrary to the provisions of the law." 378 U. S., at 109.

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The Court held, over the dissent of Mr. Justice Clark, Mr. Justice STUART, and myself, that this unsupported conclusion of an unidentified informant provided no basis for the magistrate to make an independent judgment as to the persuasiveness of the facts relied upon to show probable cause. Here, of course, we have much more, and the Court in *Aguilar* was careful to point out that additional information of the kind presented in the affidavit before us now would be highly relevant:

"If the fact and results of such a surveillance had been appropriately presented to the magistrate, this would, of course, present an entirely different case."

878 U. S. 109, n. 1.

In the present case even the two-judge minority of the court below recognized, as this Court seems to recognize today, that this additional information took the case beyond the rule of *Aguilar*. Six of the other circuit judges disagreed with the two dissenting judges, finding that all the circumstances considered together could support a reasonable judgment that gambling probably was taking place. I fully agree with this carefully considered opinion of the court below.

I regret to say I consider today's decision an indefensible departure from the principles of our former cases. Less than three years ago we reaffirmed these principles in *United States v. Ventresca*, 380 U. S. 102, 108 (1965):

"If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants . . . must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. . . . Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area."

See also *Husty v. United States*, 282 U. S. 694, 700-701 (1931).

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Departures of this kind are responsible for considerable uneasiness in our lower courts, and I must say I am deeply troubled by the statements of Judge Gibson in the court below:

"I am, indeed, disturbed by decision after decision of our courts which place increasingly technical burdens upon law enforcement officials. I am disturbed by these decisions that appear to relentlessly chip away at the ever narrowing area of effective police operation. I believe the holdings in *Aguilar*, and *Rugendorf v. United States*, 376 U. S. 528 (1964) are sufficient to protect the privacy of individuals from hastily conceived intrusions, and I do not think the limitations and requirements on the issuance of search warrants should be expanded by setting up over-technical requirements approaching the now-discarded pitfalls of common law pleadings. Moreover, if we become increasingly technical and rigid in our demands upon police officers, I fear we make it increasingly easy for criminals to operate, detected but unpunished. I feel the significant movement of the law beyond its present state is unwarranted, unneeded, and dangerous to law enforcement efficiency." — F. 2d — (1967) (dissenting from panel opinion).

The Court of Appeals in this case took a sensible view of the Fourth Amendment, and I would wholeheartedly affirm its decision.

Mapp v. Ohio, 367 U. S. 643, decided in 1961 held for the first time that the Fourth Amendment and the exclusionary rule of *Weeks v. United States*, 232 U. S. 383 (1914) are now applicable to the States. That Amendment provides that search warrants shall not be issued without probable cause. The existence of probable cause is a factual matter that calls for the determination of a factual question. While no statistics are immediately

available, questions of probable cause to issue search warrants and to make arrests are doubtless involved in many thousands of cases in state courts. All of those probable cause state cases are now potentially reviewable by this Court. It is, of course, physically impossible for this Court to review the evidence in all or even a substantial percentage of those cases. Consequently, whether desirable or not, we must inevitably accept most of the fact findings of the state courts, particularly when, as here in a federal case, both the trial and appellate courts have decided the facts the same way. It cannot be said that the trial judge and six members of the Court of Appeals committed flagrant error in finding from evidence that the magistrate had probable cause to issue the search warrant here. It seems to me that this Court would best serve itself and the administration of justice by accepting the judgment of the two courts below. After all, they too are lawyers and judges, and much closer to the practical, everyday affairs of life than we are.

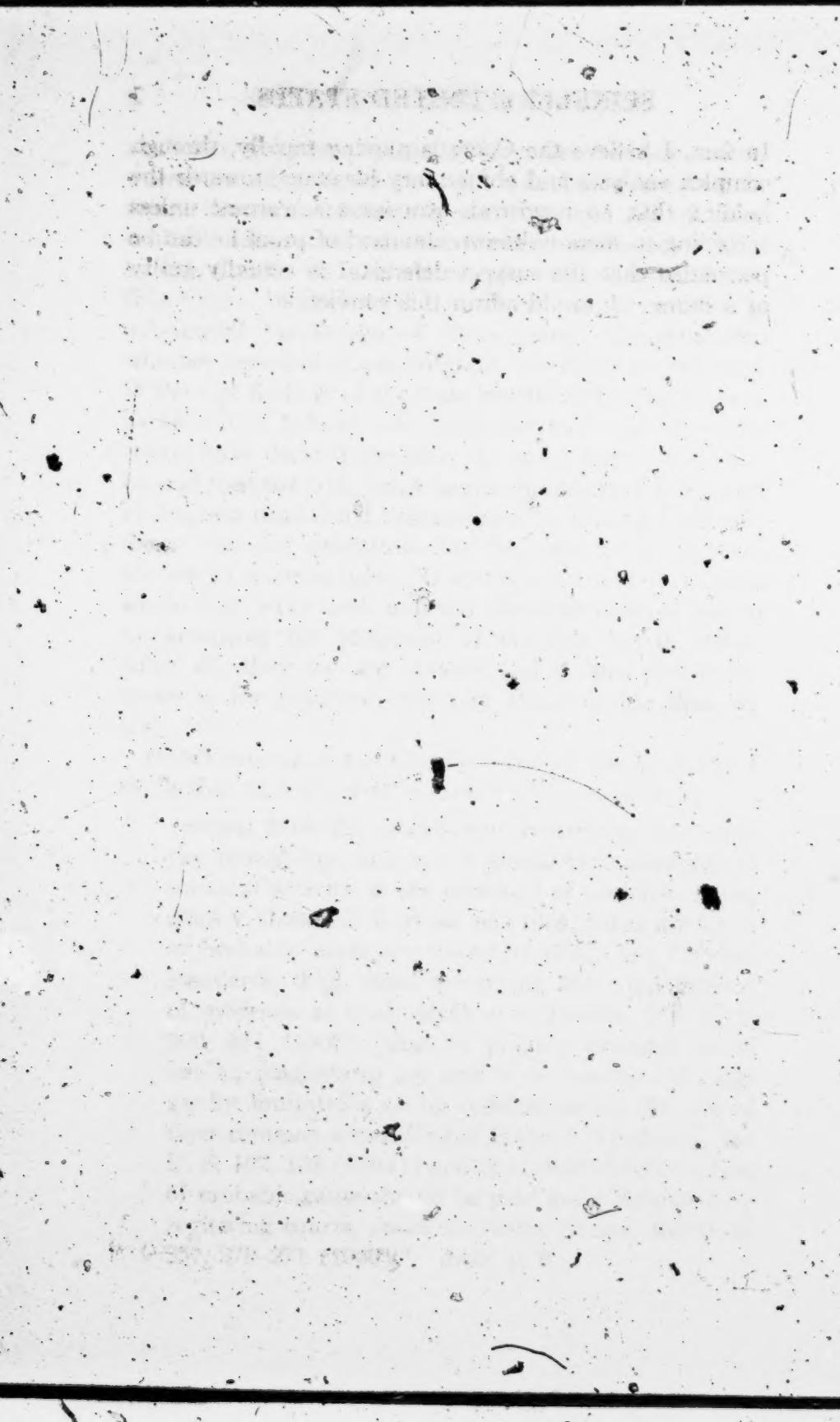
Notwithstanding the Court's belief to the contrary, I think that in holding as it does, the Court does:

"retreat from the established propositions that only the probability, and not a *prima facie* showing, of criminal activity is the standard of probable cause, *Beck v. Ohio*, 379 U. S. 89, 96 (1964); that affidavits of probable cause are tested by much less rigorous standards than those governing the admissibility of evidence at trial, *McCray v. Illinois*, 386 U. S. 300, 311 (1967); that in judging probable cause issuing magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense, *United States v. Ventresca*, 380 U. S. 102, 108 (1964); and that their determination of probable cause should be paid great deference by reviewing courts, *Jones v. United States*, 362 U. S. 257, 270-271 (1960)." *Ante*, p. 9.

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In fact, I believe the Court is moving rapidly, through complex analyses and obfuscatory language, towards the holding that no magistrate can issue a warrant unless according to some unknown standard of proof he can be persuaded that the suspect defendant is actually guilty of a crime. I would affirm this conviction.



SUPREME COURT OF THE UNITED STATES

No. 8.—OCTOBER TERM, 1968.

William Spinelli, Petitioner,
v.
United States.

On Writ of Certiorari to
the United States Court
of Appeals for the Eighth
Circuit.

[January 27, 1969.]

MR. JUSTICE FORTAS, dissenting.

My Brother HARLAN's opinion for the Court is animated by a conviction which I share that "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society." *Wolf v. Colorado*, 338 U. S. 25, 27 (1949).

We may well insist upon a sympathetic and even an indulgent view of the latitude which must be accorded to the police for performance of their vital task; but only a foolish or careless people will deduce from this that the public welfare requires or permits the police to disregard the restraints on their actions which historic struggles for freedom have developed for the protection of liberty and dignity of citizens against arbitrary state power.

As Justice Jackson (dissenting) stated in *Brinegar v. United States*, 338 U. S. 160, 180 (1949):

"[The provisions of the Fourth Amendment] are not mere second class rights but belong to the catalog of indispensable freedoms. Among deprivation of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked

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among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police."

History¹ teaches us that this protection requires that the judgment of a judicial officer be interposed between the police, hot in pursuit of their appointed target, and the citizen; that the judicial officer must judge and not merely rubber-stamp; and that his judgment must be based upon judicially reliable facts adequate to demonstrate that the search is justified by the probability that it will yield the fruits or instruments of crime—or, as this Court has only recently ruled, tangible evidence of its commission.² The exceptions to the requirement of a search warrant have always been narrowly restricted³ because of this Court's long-standing awareness of the fundamental role of the magistrate's judgment in the preservation of a proper balance between individual freedom and state power. See *Trupiano v. United States*, 334 U. S. 699, 700 (1948).

Today's decision deals, not with the necessity of obtaining a warrant prior to search, but with the difficult problem of the nature of the showing that must be made

¹ "The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples." *Wolf v. Colorado*, 338 U. S. 25, 28 (1949). See *United States v. Rabinovitz*, 339 U. S. 56, 69-70 (1950) (Frankfurter, J., dissenting).

² See *Jackson v. United States*, 333 U. S. 10, 13-14 (1948).

³ *Warden v. Hayden*, 387 U. S. 294 (1967).

* See *Jones v. United States*, 357 U. S. 493, 499 (1958); *Warden v. Hayden*, 387 U. S. 294, 311 (1967) (dissenting opinion).

before the magistrate to justify his issuance of a search warrant. While I do not subscribe to the criticism of the majority expressed by my Brother BLACK in dissent, I believe—with all respect—that the majority is in error in holding that the affidavit supporting the warrant in this case is constitutionally inadequate.

The affidavit is unusually long and detailed. In fact, it recites so many minute and detailed facts developed in the course of the investigation of Spinelli that its substance is somewhat obscured. It is paradoxical that this very fullness of the affidavit may be the source of the constitutional infirmity that the majority finds. Stated in language more direct and less circumstantial than that used by the FBI agent who executed the affidavit, it sets forth that the FBI has been informed that Spinelli is accepting wagers by means of telephones numbered WY 40029 and WY 40136; that Spinelli is known to the affiant agent and to law enforcement agencies as a bookmaker; that telephones numbered WY 40029 and WY 40136 are located in a certain apartment; that Spinelli was placed under surveillance and his observed movements were such as to show his use of that apartment and to indicate that he frequented the apartment on a regular basis.

Aguilar v. United States, 378 U. S. 108 (1964), holds that the reference in an affidavit to information described only as received from "a confidential reliable informant," standing alone, is not an adequate basis for issuance of a search warrant. The majority agrees that the "FBI affidavit in the present case is more ample than that in *Aguilar*," but concludes that it is nevertheless constitutionally inadequate. The majority states that the present affidavit fails to meet the "two-pronged test" of *Aguilar* because (a) it does not set forth the basis for the assertion that the informer is "reliable" and (b) it fails to state the "underlying circumstances" upon which the

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informant based his conclusion that Spinelli was engaged in bookmaking.

The majority acknowledges, however, that its reference to a "two-pronged test" should not be understood as meaning that an affidavit deficient in these respects is necessarily inadequate to support a search warrant. Other facts and circumstances may be attested which will supply the evidence of probable cause needed to support the search warrant. On this general statement we are agreed. Our difference is that I believe such facts and circumstances are present in this case, and the majority arrives at the opposite conclusion.

Aguilar expressly recognized that if, in that case, the affidavit's conclusory report of the informant's story had been supplemented by "the facts and results of . . . a surveillance . . . this would, of course, present an entirely different case." 378 U. S., at 109, n. 1. In the present case, as I view it, the affidavit showed not only relevant surveillance, entitled to some probative weight for purposes of the issuance of a search warrant, but also additional, specific facts of significance and adequate reliability: that Spinelli was using two telephone numbers, identified by an "informant" as being used for bookmaking, in his illegal operations; that these telephones were in an identified apartment; and that Spinelli, a known bookmaker,⁴ frequented the apartment. Certainly, this is enough.

A policeman's affidavit should not be judged as an entry in an essay contest. It is not "abracadabra."⁵

⁴ Although Spinelli's reputation standing alone would not, of course, justify the search, this Court has held that such a reputation may make the informer's report "much less subject to scepticism than would be such a charge against one without such a history."

Jones v. United States, 362 U. S. 257, 271 (1960).

⁵ See *Time, Inc. v. Hill*, 385 U. S. 374, 418 (1967) (dissent) (relating to jury instructions).

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As the majority recognizes, a policeman's affidavit is entitled to common-sense evaluation. So viewed, I conclude that the judgment of the Court of Appeals for the Eighth Circuit should be affirmed.

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[January 27, 1969.]

MR. JUSTICE STEWART, dissenting.

For substantially the reasons stated by my Brothers BLACK and FORTAS, I believe the warrant in this case was supported by a sufficient showing of probable cause. I would therefore affirm the judgment.